TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~557~~. 318

WILLIAM H. WARNER, PLAINTIFF IN ERROR,

vs.

JAMES F. JOY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED JULY 29, 1871.

SUPREME COURT OF THE UNITED STATES.

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1 Pleas before the Hon. Samuel F. Miller & Hon. Jno. F. Dillon, judges of the circuit court of the United States for the district of Kansas, at a term of said court begun and held at Topeka, in and for said district, on Monday, the 22d day of May, A. D. 1871:

JAMES F. JOY, PLAINTIFF,
vs.
WILLIAM H. WARNER, DEFENDANT. } 267.

Be it remembered that, on the 28th day of October, A. D. 1870, the said plaintiff, by C. W. Blair, his attorney, filed in the clerk's office of said court his petition and precepe; which are in words and figures following, to wit:

Petition.

In the circuit court of the United States in and for the district of the State of Kansas.

JAMES F. JOY, PLAINTIFF,
against
WILLIAM H. WARNER, DEFENDANT. } Action for the recovery of real property.

2 The said James F. Joy, plaintiff, complains of the said William H. Warner, defendant, and assigns the following in his cause of action:

The said plaintiff alleges that he is the owner in fee of the following lands and tenements, situate in the county of Crawford and State of Kansas, to wit, the southeast quarter (S. E. ¼) of section number twenty-five, (25,) township number twenty-nine (29) south of range number twenty-three (23) east of the sixth principal meridian, and is entitled to the possession thereof. And he further states that the said defendant, William H. Warner, unlawfully keeps him, the said James F. Joy, out of the possession of the said premises above described.

The said plaintiff*s*, therefore, asks judgment against the said defendant for the recovery of the possession of the said premises, and the costs of this suit.

JAMES F. JOY,
By CHA'S W. BLAIR,
His Att'y.

Precipe.

JAMES F. JOY, PL'FF,
ag't
WILLIAM H. WARNER, DEF'T. }

3 The clerk of the circuit court U. S. will issue a summons in this case for the said W. H. Warner, who is a resident of Crawford County, directed and returnable according to law.

CHA'S W. BLAIR.
Att'y for Pl'ff.

Which said petition and precepe was and is endorsed in words and figures following, to wit:

No. 267. Circuit court U. S., district of Kansas. James F. Joy, pl'ff, ag't William H. Warner, def't. Petition & precipe. Filed October 28, 1870. A. S. Thomas, clerk. C. W. Blair for pl'ff.

And the said plaintiff, by his said attorney, on the said 28th day of October, A. D. 1870, further file' in said clerk's office security for costs; which is in words and figures following, to wit:

Circuit court of the United States for the district of Kansas.

JAMES F. JOY, PL'FF,
vs.
WILLIAM H. WARNER, DEF'T.

I enter myself security for costs in said case, and promise to
4 pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court. And in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this 28th day of October, 1870.

CHA'S W. BLAIR.

(Endorsed:) 267. James F. Joy vs. William H. Warner. Security for costs. Filed Oct. 28, 1870. A. S. Thomas, clerk.

And thereupon, on the 28th day of October, A. D. 1870, the clerk of said court issued a writ of summons in said case; which is in words and figures following, to wit:

Circuit court of the United States of America, district of Kansas, ss.

The United States of America to the marshal of the district of Kansas, greeting:

You are hereby commanded to notify William H. Warner that
5 he has been sued by James F. Joy, in the circuit court of the United States for the district of Kansas, and that unless he answer, by the 22nd day of November, A. D. 1870, the petition of the said James F. Joy against him, filed in the clerk's office of the said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this writ on the 2nd day of November, A. D. 1870.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Topeka, in said district, this 28th day of October, in the year of our Lord one thousand eight hundred and seventy.

[SEAL.] A. S. THOMAS, *Clerk.*

Which said summons was and is endorsed in words and figures following, to wit:

Action brought for the recovery of land.

C. W. BLAIR,
Attorney for Plaintiff.

No. 267. Circuit court of the United States, district of Kansas, James

F. Joy vs. William H. Warner. Summons. Issued Oct. 28, 1870. Returnable Nov. 2, 1870. C. W. Blair, attorney for plaintiff.

6 I hereby acknowledge and accept personal service of the within summons this 30th day of October, 1870.

W'M H. WARNER.

Filed Nov. 5, A. D. 1870. A. S. Thomas, clerk.

And afterwards, to wit, on the 5th day of November, A. D. 1870, an agreement was filed in said case; which is in words and figures following, to wit:

In the circuit court of the United States in and for the district of the State of Kansas, November term, A. D. 1870.

JAMES F. JOY, PL'FF, *vs.* WILLIAM H. WARNER, DEF'T. } Petition to recover possession of real estate.

It is agreed by and between the parties hereto, that this case shall stand for trial on the 28th day of November, 1870, whether by the statutes of the State and the rules of the court it be at issue at that time or not, it being the desire of both parties that their respective rights shall be adjudicated and settled at the earliest possible date.

C. W. BLAIR,
Att'y for Ja's F. Joy.
W'M H. WARNER.

7 Which said agreement was and is endorsed in words and figures following, to wit:

No. 267. James F. Joy vs. W'm H. Warner. Agreement. Filed Nov 5, 1870. A. S. Thomas, clerk.

And afterwards, to wit, at a term of the circuit court of the United States of America, in and for the district of Kansas, begun and held at Topeka, in said district, on Monday, the 28th day of November, A. D. 1870.

At which term of said court, among other proceedings, the following were had, and appear of record, in words and figures following, to wit:

WEDNESDAY, *November* 30, 1870.

JAMES F. JOY *vs.* WILLIAM H. WARNER } 267.

This day came the parties, by their attorneys, and by agreement this case is continued.

And on this day, to wit, the 1st day of June, A. D. 1871, came the said defendant, by W'm S. Rockwell, his attorney, and filed in
8 the said clerk's office his answer in the said entitled cause; which answer is in words and figures following, to wit:

Answer.

In the circuit court of the United States in and for the district of the State of Kansas.

JAMES F. JOY, PL'T'F,
vs.
WILLIAM H. WARNER, DEF'T.

And now comes the said William H. Warner, defendant, and for answer to the petition of said plaintiff, denies that the said plaintiff is the owner of the southeast quarter of section 25, T. 29, range 23, being the land in the plaintiff's petition mentioned, as is alleged in said petition.

And for a second and further defense to said petition, the said defendant says that he admits that the land in the plaintiff's petition mentioned was patented from the Government of the United States to James F. Joy; that it was conveyed by deed from James *T.* Joy to the Missouri River, Fort Scott and Gulf Railroad, and subsequently re-
9 conveyed by said Missouri River, Fort Scott and Gulf Railroad to James F. Joy, the plaintiff herein, and that said patents and conveyances are in due form of law.

But this defendant claims and avers that said patent was granted and issued by virtue and in pursuance of a pretended treaty purporting to have been made and executed between the United States and the Cherokee Indians, and published and proclaimed by the President, August 11th, 1866, and that said treaty was void so far as it attempted to convey said land, or authorize the conveyance thereof, for the reason that, in seeking or attempting to alienate the land in question, it is in violation of the Constitution of the United States, which gives to Congress the power to dispose of the territory and other property belonging to the United States.

Defendant also avers that the pretended sale attempted to be made to James F. Joy in pursuance of the alleged treaty with the Cherokee Indians, is and was void ab initio, because the conditions and requirements of said so-called treaty were not complied with in said pretended sale.

Defendant further avers that the land in the petition mentioned,
10 and the Cherokee Neutral Lands, of which the said tract forms a part, became and were a part of the public domain of the United States, by virtue of the abandonment by the Cherokees of their right of occupancy thereof, long anterior to the execution of said pretended treaty of 1866.

He further states that he settled on said land on or about the 5th day of November, 1869, in good faith, as a pre-emption claimant, and is entitled to the benefits of the pre-emption act of September 4th, 1841, and the several acts amendatory thereof; that he has sought to file his declaratory statement under said act with the register and receiver of the proper local land office at Humboldt, Kansas, but that they have hitherto refused, and still refuse, to receive the same.

Defendant, therefore, avers that he is the equitable owner of the real estate in the plaintiff's petition mentioned, notwithstanding the plaintiff holds a pretended legal title thereto.

WILLIAM H. WARNER.

W'M S. ROCKWELL,
Att'y for Def't.

11 (Endorsed:) No. 267. U. S. circuit court. James F. Joy, pl'ff, ag't William H. Warner, def't. Answer. Filed June 1, 1871. A. S. Thomas, clerk.

And on this day, to wit, the 1st day of June, A. D. 1871, came the said plaintiff, by C. W. Blair, his attorney, and filed in said clerk's office a demurrer to 2nd defense of def'ts answer in the said entitled cause; which demurrer is in words and figures following, to wit:

THE UNITED STATES OF AMERICA,
In the District of Kansas, ss:

JAMES F. JOY, PL'FF,
vs.
W. H. WARNER, DEF'T.

And now comes the pl'ff, by C. W. Blair, his attorney, and demurs to the second defence of defendant's answer, & assigns the following as causes of demurrer, viz:

1. That said second defence does not contain facts sufficient to constitute a defence to plaintiff's cause of action.

12 2. That said second defence does not state facts constituting a defence in law to plaintiff's cause of action.

3. That the facts stated in said second defence (if a defence at all) constitute an equitable and not a legal defence to plaintiff's said cause of action.

C. W. BLAIR,
Att'y for Pl'ff.

(Endorsed:) No. 267. U. S. circuit court. James F. Joy, pl'ff, vs. W. H. Warner, def't. Demurrer to 2nd defence of def't's answer. Filed June 1, 1871. A. S. Thomas, clerk.

And on this day, to wit, the 1st day of June, A. D. 1871, came the said plaintiff and defendant, by their respective attorneys, and filed a stipulation, waiving a jury, and consenting to a trial by the court; which stipulation is in words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Kansas:

JAMES F. JOY
vs.
W'M H. WARNER.

13 It is agreed in this case, that a jury shall be, and is hereby, waived, and both parties hereby consent that the issues in the case shall be tried by the court.

June 1, 1871.

C. W. BLAIR,
Att'y for Pl'ff.
W'M S. ROCKWELL,
Att'y for Def't.

(Endorsed:) No. 267. J. F. Joy, pl'ff, vs. W. H. Warner, def't. Stip-

ulation as to trial by court & waiving jury. Filed June 1, 1871. A. S. Thomas, clerk.

And on this day to wit, the 1st day of June, A. D. 1871, came the said parties by their respective attorneys and filed an agreed state of facts, in the clerk's office; which is in words and figures following, to wit:

In the United States circuit court in and for the district of the State of Kansas.

14 *Agreed state of facts.*

JAMES F. JOY, PLAINTIFF,
vs.
WILLIAM H. WARNER, DEFENDANT.

It is agreed by and between the parties in this case, that the issues shall be tried upon the following agreed facts, to wit:

First. It is agreed that the land in the plaintiff's petition mentioned is a part of the second tract of land mentioned in the second article of the Cherokee treaty, of 1835, and was patented with another and larger body of land "to the Cherokee Nation forever" by patent from the President of the United States, dated December 31, 1838; that said land is also a part of the land mentioned in the first part of the 17th article of the Cherokee treaty of 1866, and a part of the same land mentioned in the preamble to the supplemental treaty of June 10, 1868, and which is the subject of said supplemental treaty. It is agreed that said land was
15 sold to James F. Joy, by the Secretary of the Interior, in pursuance of said treaties; that said Joy paid the full purchase-money of said land to the Secretary of the Interior, for the use and benefit of the Cherokee Indians, at the rate of one dollar ($1) per acre, as stipulated in said treaties; that he received a patent from the Government of the United States, for the land in the petition mentioned; that, for a valuable consideration, he conveyed said tract, among others, to the Missouri River, Fort Scott & Gulf Railroad, and that said tract of land, for a valuable consideration, was re-conveyed to him by said railroad company; that said Missouri River, Fort Scott & Gulf Railroad is capable of holding and conveying real estate, by its charter and the acts of Congress and the laws of the State of Kansas; that said patent and conveyances are in due form of law, and that said land mentioned in the petition, is worth the sum of three thousand dollars, ($3,000 00.)

Second. It is agreed that said defendant settled on said land, in good faith, as a pre-emption claimant, on or about the 5th of November, 1869; that he has made lasting and valuable improvements thereon, enough to entitle him to the benefit of the pre-emption laws, if
16 the land is subject to the operation of said laws; that he duly offered to file his declaratory statement in the local land office of the district in which said land is situated, and the officers of said land office have refused to receive the same. It is also agreed, that the pretended treaty of October 7, 1861, between the Cherokee Nation and the so-called confederate government, shall be regarded as being in evidence in this case, for whatever the same may be worth as legal evidence.

Third. It is also agreed, that the "Mo. River, Fort Scott & Gulf Railroad" is the "Kansas & Neosho Valley Railroad Company," it having simply changed its name under the laws of this State.

Fourth. It is further agreed, that Kersey Coats, president of the Mo. River, Fort Scott & Gulf Railroad and James F. Joy, if on the stand, would each testify that James F. Joy made the purchase of Cherokee Neutral Lands, under the treaties of 1866 & 1868, not for himself, but for the Kansas & Neoshoe Valley R. R. Co., now the Missouri River, Fort Scott & Gulf Railroad, as its agent and for its benefit, and that he paid for said lands with the money of said railroad company,
17 and that this testimony on the part of these two persons shall be regarded as being in evidence in this case.

JAMES F. JOY,
C. W. BLAIR, *his Attorney.*
WILLIAM H. WARNER.

(Endorsed:) No. 267. U. S. circuit court. James F. Joy, pl'ff, vs. William H. Warner, def't. Agreed state of facts. Filed June 1, 1871. A. S. Thomas, clerk.

And afterwards, to wit, at a term of the circuit court of the United States of America, in and for the district of Kansas, begun and held at Topeka on Monday, the 22d day of May, A. D. 1871, there were present the Hon. Samuel F. Miller and Jno. F. Dillon, judges of said court.

At which term of said court, on the 1st day of June, A. D. 1871, among other proceedings, the following were had and appear of record in words and figures following, to wit:

THURSDAY, *June* 1, 1871.

18 JAMES F. JOY, PLAINTIFF, *vs.* WILLIAM H. WARNER, DEFENDANT. } 267.

This day comes the plaintiff, by C. W. Blair, his attorney, and the defendant, by W. S. Rockwell, his attorney; and, by consent of parties, the said defendant filed his answer herein, and the said plaintiff filed his demurrer to the second defence of defendant's answer.

And this cause came on for hearing on said demurrer to said second defence; and the court, on consideration of the premises, doth sustain said demurrer to said second defence of said answer. To which decision of the court the defendant, by his counsel, excepted and excepts.

Whereupon this cause came on for final hearing on the agreed state of facts and testimony; and, by consent of parties, by stipulation in writing and on file, a trial by jury was waived and cause submitted to the court; and the court do find that the plaintiff is the legal
19 owner of the premises in the petition mentioned.

It is therefore considered and adjudged by the court, that the plaintiff recover of the defendant the premises mentioned in the petition, to wit, the southeast quarter (S. E. ¼) of section number twenty-five, (25,) township number (29) south of range number twenty-three (23) east of the sixth (6th) principal meridian, and his costs herein expended, taxed at $.

And on this day, to wit, the 20th day of June, A. D. 1871, came the

said W'm H. Warner, by W'm S. Rockwell, his attorney, and filed in the said clerk's office a bond for costs in the said entitled cause; which said bond is in words and figures following, to wit:

Supreme Court of the United States.

WILLIAM H. WARNER, PL'FF IN ERROR,
vs.
JAMES F. JOY, DEF'T IN ERROR.

Know all men by these presents that we, William H. Warner,
20 as principal, and B. P. McDonald, as surety, are held and firmly bound unto James F. Joy, of the city of Detroit, in the sum of two hundred dollars, to be paid to the said Joy *by* his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each *and each* of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this 15th day of June, A. D. 1871.

Whereas the above-bounden W'm H. Warner hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the district of Kansas:

Now, therefore, the condition of this obligation is such, that if the above-named W'm H. Warner shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

W'M H. WARNER. [SEAL.]
21 B. P. McDONALD, [SEAL.]
Fort Scott, Kansas.

Signed, sealed, and delivered in presence of—
B. S. HENNING.

(Endorsed:) No. 267. Supreme Court. W'm H. Warner, pl'ff in error, vs. James F. Joy, def't in error. Bond for costs.

Approved this 17th day of June, A. D. 1871, and I do certify that the within-named McDonald is known to me to be perfectly responsible for the within-named amount.

MARK W. DELAHAY,
Associate Justice of U. S. Circuit Court for the District of Kansas.

Filed June 20, 1871.

A. S. THOMAS, *Clerk.*

And on this day, the 20th day of June, A. D. 1871, came the said W. H. Warner, by his atto'ney, W. S. Rockwell, and filed in the said clerk's office his order for writ of error in the said entitled cause; which order is in words and figures following, to wit:

WILLIAM H. WARNER, PL'FF IN ERROR,
vs.
JAMES F. JOY, DEF'T IN ERROR.

22 Upon filing a bond in the above cause, this day approved, let a writ of error from the Supreme Court of the United States to the

circuit court of the United States for the district of Kansas to reverse the same in the above-entitled cause from said court to the Supreme Court. Make the said writ returnable on the first day of next term of said court.

MARK W. DELAHAY,
Associate Justice of the U. S. Circuit Court for the District of Kansas.

To A. S. THOMAS, Esq.,
Clerk of the Circuit Court for the Dis't of Kansas.

(Endorsed:) No. 267. Supreme Court. W'm H. Warner, pl'ff in error, vs. James F. Joy, def't in error. Order for writ of error. Filed June 20, 1871. A. S. Thomas, clerk.

23 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States for the district of Kansas, do hereby certify the foregoing transcript to be a true, full, and perfect copy from the record of all the proceeding' had in said court in the case of James F. Joy, plaintiff, vs. William H. Warner, defendant.

In testimony whereof I have hereunto set my hand, and affixed the seal of said court at my office in Topeka, in said district of Kansas, this 26th day of June, A. D. 1871.

[SEAL.] A. S. THOMAS, *Clerk.*

24 UNITED STATES OF AMERICA, *ss:*

To JAMES F. JOY, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Kansas, wherein William H. Warner is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of said Supreme Court of the United States, this day of June, in the year of our Lord one thousand eight hundred and seventy-one.

MARK W. DELAHAY,
Associate Justice of U. S. Circuit Court for the District of Kansas.

25 A copy of the within citation served upon me this 19th day of June, A. D. 1871.

C. W. BLAIR,
Att'y for Def't in Error.

(Indorsed:) No. 267. Supreme Court. W'm H. Warner, pl'ff in error, vs. James F. Joy, def't in error. Citation. Filed June 20, 1871. A. S. Thomas, clerk.

26 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the district of Kansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between James F. Joy, plaintiff, and William H. Warner, defendant in *the proceedings before you, which said William H. Warner is plaintiff in error, and said Joy is defendant in* error, a manifest error hath happened, to the great damage of the said William H. Warner, as by
27 his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the 20th of June, in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL.]

A. S. THOMAS,
Clerk of the Circuit Court of the United States
for the District of Kansas.

Approved by—

(Indorsed:) No 267. W'm H. Warner, pl'ff in error, vs. James F. Joy, def't in error. Writ of error. Filed June 20, 1871. A. S. Thomas, clerk. W'm S. Rockwell, att'y for pl'ff in error; C. W. Blair, att'y for def't in error.

(Indorsement on cover:) No. 557. William H. Warner, plaintiff in error, vs. James F. Joy. Kansas C. C. U. S. Filed 29th July, 1871.

Supreme Court of the United States.

DECEMBER TERM, 1871.

PETER J. HOLDEN, Appellant,
vs.
JAMES F. JOY.
No. 360. In Chancery.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

ARGUMENT FOR THE APPELLANT.

The case.

The bill alleges that James F. Joy procured a patent from the United States, dated October 31, 1868, by virtue of the Cherokee treaty of 1866, and the supplemental treaty of 1868, for the S. E. ¼ of section 17, township 31 north, of range 25 east, in Crawford county, Kansas; that on the 12th of February, 1867, the complainant, having the requisite qualifications, took, and has since continued in possession of the land, for the purpose of procuring a title thereto under the pre-emption laws, and has been ready and willing to comply with their provisions, but that the proper officers refused to receive proof and compliance therewith which plaintiff tendered; that the defendant has commenced an action of ejectment against him, which he prays may be enjoined, and for other proper relief.

The defendant demurs.

TREATIES AND ACTS OF CONGRESS—PROCEEDINGS UNDER THEM.

In order to understand the questions now presented for decision, it is necessary to trace to some extent the title to the

lands in controversy, and to consider the treaties, acts of Congress, and proceedings relating to them. To determine the construction and effect of these, a somewhat elaborate examination of constitutional and legal principles becomes necessary. The lands in controversy are a part of a tract of $799{,}615\frac{18}{100}$ acres, situated in the southeast corner of the State of Kansas, extending in length fifty miles north and south, and twenty-five miles in width. This tract, known as "the Cherokee neutral lands," and generally called 800,000 acres, was acquired by the United States as a part of the "Louisiana purchase" from the French Republic.

By the treaty between the United States and the French Republic of April 30, 1803, (8 United States Statutes at Large, 200,) it is declared that—

> "The first consul of the French Republic * * * doth hereby cede to the said United States, in the name of the French Republic, forever and in full sovereignty, the said territory, with all its rights and appurtenances," &c.

It is unnecessary now to go back of this treaty, or to inquire more particularly as to the title of the United States, since it is conceded on all hands that when the United States took possession of the "Louisiana purchase," in pursuance of the act of Congress of October 31, 1803, which gave effect to the treaty, the absolute fee simple title and right of sovereignty and jurisdiction were in the United States.

This land was then, and for many years thereafter, occupied by the Osage Indians.

By the Osage treaty of June 2, 1825, (7 Stat., 240,) the Osage Indian right of occupancy in the lands was extinguished by a provision in these words:

> "The Great and Little Osage tribes do hereby cede and relinquish to the United States all their right, title, interest, and claims to lands lying * * * west of the said State of Missouri, * * * &c., with such reservations, for such considerations, and upon such terms as are hereinafter specified."

This tract of 800,000 acres was intended be a "*neutral land*," separating the civilized people of Missouri from the Osage Indians, and was then called the "Osage neutral lands." When this tract subsequently passed by treaty to the possession of the Cherokees, it was called "the Cherokee neutral lands."

Prior to 1817 the Cherokee Indians resided east of the Mississippi.

Under the treaty of July 8, 1817, (7 Stat., 156,) and February 27, 1819, (7 Stat., 195,) they were divided into two parties, one electing to remain east of the Mississippi, one to go as they did, and as the treaty says, making "choice of the country on the Arkansas and White rivers, and settled themselves down upon *United States land*" (p. 157) in Arkansas, where "they will be longer unappproached by our settlements."

With this "Cherokee nation of Indians *west of the Mississippi*" treaties were made May 6, 1828, (7 Stat., 311,) and February 14, 1833, (7 Stat., 414.)

The first of these recites that—

"Whereas it being the anxious desire of the Government of the United States to secure to the Cherokee Nation of Indians, as well those *now living within the* limits of the Territory of *Arkansas*, as *those* of their friends and brothers *who reside* in States *east of the Mississippi*, and who may wish to join their brothers of the West, a permanent home, which shall, under the most solemn guarantee of the United States, be and remain theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction, of a Territory or State, nor be pressed over by the extension in any way of the limits of any existing Territory or State; and *whereas* the present location of the Cherokees in Arkansas being unfavorable to their present repose and tending, as the past demonstrates, to their future degradation and misery," &c.

The treaty then gives to the Indians a *possessory right* to lands west of Arkansas, the boundaries of which it defines. The right is given in these words:

"The United States agree *to possess the Cherokees*, and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land, to be bounded," &c.

It will be observed, one of the objects of this treaty was ultimately to secure a home for the Eastern Cherokees with the Western division. The treaty of 1833 corrected disputed boundaries, and made other provisions, not now material, and then says, (p. 415:)

"The United States agree to *possess* the Cherokees, and to guarantee it to them forever, and that guarantee is hereby pledged, of seven millions of acres of land, to be bounded as follows: * * * And letters patent shall be issued by the United States, as soon as practicable, for the land hereby guaranteed."

Neither of these treaties related to the Cherokee *neutral lands*, neither was made with the *Eastern* Cherokees, and both

agreed not to grant a fee—not to grant a right of soil—but only to *possess* the Cherokees of the land described.

And the treaty of 1833 repealed a provision of that of 1828, which required the United States to give the Cherokees, "when they desire it, a plain set of laws;" and to survey their lands "when they may wish to lay off their lands and own them individually." (Art. III, 7 Stat., 416.)

On the 28th of May, 1830, Congress, in accordance with the power maintained and exercised before and ever since, without denial of authority by any court, to *authorize* and *regulate* treaties with Indians, to *abrogate* them when made, to *execute* or *not* to execute them, as public duty or interest might require, or to *prohibit them entirely*, passed an act, the title and some of the provisions of which are as follows:

"An act to provide for an *exchange* of lands with the Indians residing in any of the States or Territories, and for their removal west of the river Mississippi.

"SEC. 1. *Be it enacted, &c.*, That it shall and may be lawful for the President of the United States to cause as much of any territory belonging to the United States west of the river Mississippi, not included in any State or organized Territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside and remove there; and to cause each of said districts to be so described by natural or artificial marks as to be easily distinguished from every other."

"SEC. 2. That it shall and may be lawful for the President to exchange any or all of such districts, so to be laid off and described, with any tribe or nation of Indians now residing within the limits of any of the States or Territories, and with which the United States have existing treaties, for the whole or any part or portion of the territory claimed and occupied by such tribe or nation within the bounds of any one or more of the States or Territories where the land claimed or occupied by the Indians is owned by the United States, or the United States are bound to the State within which it lies to extinguish the Indian claim thereto. (Repealed March 3, 1839, 5 Stat., 328.)

"SEC. 3. That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided always*, That such lands shall revert to the United States if the Indians become extinct or abandon the same."

In *pursuance of this act* of Congress, the treaty of December 29, 1835, (7 Stat., 478,) with the *Eastern* Cherokees was made. That it was by virtue of the power conferred by the act is clear, because *other provisions* which I have not cited

are in effect *incorporated into the treaty*, and the treaty in express terms *refers to the act to control its provisions.*

This treaty of 1835 gives the Cherokees a *possessory right* on lands, all of which are in the so-called "Indian territory" south of Kansas, but includes, also, *in Kansas*, the *neutral lands*, and a "strip of about two miles in width, adjoining the south boundary of the State, and extending west from the Neosho river to the 100th meridian, 288 miles, estimated to contain 368,640 acres."

The treaty contains these provisions:

"ART. 1. The Cherokee nation hereby cede, relinquish, and convey to the United States all the lands owned, claimed, or possessed by them east of the Mississippi river * * for and in consideration of the sum of five millions of dollars, to be expended, paid, and invested in the manner stipulated and agreed upon in the following articles:" * * &c.

"ART 2. Whereas by the treaty of May 6, 1828, and the supplemental treaty thereto of February 14, 1833, with the Cherokees *west of the Mississippi*, the United States guaranteed and secured to be conveyed by patent to the Cherokee nation of Indians the following tract of country [described as in the treaty of 1833, and then quoting the following words from the treaty:] 'which will make seven million of acres. * * In addition, * * the United States further guarantee to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said seven million acres, as far west as the sovereignty of the United States and their right of soil extend.' * * And whereas it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi, the United States, in consideration of the sum of five hundred thousand dollars, therefore, hereby covenant and agree to convey to the said Indians and their descendants, by patent in fee simple, the following additional tract of land situated between the west line of the State of Missouri and the Osage reservation: beginning at the southeast corner of the same and running north along the east line of the Osage lands, fifty miles, to the northeast corner thereof; and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning, estimated to contain eight hundred thousand acres of land.

"ART. 3. The United States also agree that the lands above ceded by the treaty of February 14, 1833, including the outlet and those ceded by this treaty, shall all be *included in one patent, executed to the Cherokee nation of Indians by the President of the United States, according to the provisions of the act of May* 28, 1830." (U. S. Statutes, vol. 7, p. 478)

This tract, estimated to contain 800,000 acres, is the Cherokee neutral lands now in controversy.

This treaty is the *first* and only one which gave the Cherokees any possessory rights or any claim on the neutral lands. The treaty of 1833 was made with the western Cherokees to secure a home for them and for the eastern Cherokees. By the treaty of 1835 the eastern Cherokees "*exchanged*" their

lands for a *possessory right* in common with the western Cherokees in 7,000,000 acres of land, and "the outlet" and the "neutral lands" and $4,500,000 in money. This was the *effect* of the treaty provisions. In *mere words* the eastern Cherokees were to receive $5,000,000 for an exchange of their right of occupancy in the eastern lands for a similar right in the western seven million acres and the outlet, and the United States gave them a possessory right in the neutral lands for $500,000, part of the five million dollars. In fact and in legal effect the Cherokees paid no money, the United States received none, but did agree to pay *out* of the Treasury five millions less half a million. There was no *money* paid by the Indians and no other purchase of lands by the Cherokees. There was an exchange of possessory rights. This was the legal effect of the transaction. The treaty declared its purpose to obey the act of May 28, 1830, which authorized such an "exchange."

In further execution of the act of 1830, and in obedience to its limitations, on the 31st day of December, 1838, a patent was issued to the Cherokees under the treaty and law, the granting clause of which is in the following words:

"Therefore, in execution of the agreements and stipulations contained in the said several treaties, the United States have given and granted, and by these presents do give and grant, unto the said Cherokee nation the two tracts of land so surveyed and hereinbefore described, containing in the whole 14,374,135 $\frac{14}{100}$ acres, to have and to hold the same, together with all the rights, privileges, and appurtenances thereunto belonging, to the said Cherokee nation forever, subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plain on the western prairie, referred to in the second article of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty-five, which salt plain has been ascertained to be within the limits prescribed for the outlet agreed to be granted by said article, and subject also to all the other rights reserved to the United States in and by the articles hereinbefore recited, to the extent and in the manner in which the said rights are so reserved, and subject also to the condition provided by the act of Congress of the 28th of May, 1830, and which condition is, 'that the lands hereby granted shall revert to the United States if the said Cherokees become extinct or abandon the same.'"

On the 7th October, 1861, was concluded a

"treaty of friendship and alliance between the Confederate States and the Cherokee nation of Indians,"

which was authorized by a general convention of the Cherokee people, and which, while saying that the

"country whereof it [the Cherokee nation] is proprietor in fee * * is annexed to the Confederate States,"

then provides as follows:

"ART. 5. The Cherokee nation hereby gives its full, free, and unqualified assent to those provisions of the act of Congress of the Confederate States of America, entitled 'An act for the protection of certain Indian tribes,' approved the 24th day of May, in the year of our Lord one thousand eight hundred and sixty-one, whereby it was declared that all *reversionary, and other interest, right, title, and proprietorship* of the United States in, unto, and over the Indian country, in which that of the said Cherokee nation is included, should pass to and vest in the Confederate States, and whereby the president of the Confederate States was authorized to take military possession and occupation of all said country."

As this was declared "void" by a subsequent treaty between the Cherokees and the United States, the court may take judicial notice of it as explanatory of the rights claimed by the Cherokees on these lands.

Subsequently to all this came the Cherokee treaties of July 19, 1866, (14 Stat., 799,) and the supplemental treaty of April 27, 1868. But before presenting these treaties, it is material to notice certain provisions of laws having reference to the same subject.

Congress, in the exercise of an undoubted power to dispose of the public lands, to *confer*, *limit*, and *regulate* the power to make treaties with Indian tribes;—Congress, having over the lands and the Indians in all respects, as said by Mr. Justice Baldwin, "*the sole and exclusive right*," "full dominion," (5 Peters, 39);—Congress, having all these powers, enacted laws regulating the *disposition of these lands*, *gave* and *limited* the power to make treaties with *these Indians*—laws relating to common subjects—statutes *in pari materia*, and which are therefore all to be construed and considered together, each to be held operative over its particular subject-matter.

I will present some provisions of these acts:

The pre-emption act of 29 May, 1830, applied only to lands "to which the Indian title was extinguished at that date." (Am. St. Pap., vol. 8; Pub. Lands, 552.) It is important to notice that this pre-emption act was passed only one day after the act authorizing Indian treaties to be made. At *that time* Congress did not intend that the right of pre-emption should

extend to any lands except those to which the Indian title had been extinguished.

The pre-emption act of September 4, 1841, (5 Stat., 455,) continued this policy, and declared that—

"No lands [then] included in any reservation, by any treaty, law, or proclamation of the President, * * or other Indian reservation to which the title has been, or *may be*, extinguished by the United States, at any time during the operation of this act, * * shall be liable to entry under and by virtue of the provisions of this act."

This provision, if continued in force, would have excluded these lands from pre-emption. But Congress determined a different policy should prevail.

The act of July 22, 1854, to establish the surveyor general's office in the Territories of Kansas and Nebraska, &c., (10 Stat., 310, sec. 12,) provides as follows:

"*And be it further enacted*, That all the lands to which the Indian title has been or shall be extinguished, within said Territories of Kansas and Nebraska, shall be subject to the operations of the pre-emption act of 4th September, 1841."

So far as pre-emption claimants in Kansas are concerned, no other law was necessary; but this was so salutary, that it was re-enacted, and extended to all the lands of the Government.

On the second day of June, 1862, Congress passed "An act to establish a land office in Colorado, and for other purposes." (12 Stats., 413.)

This act provides, in the broadest language, that—

"*All the land belonging to the United States, to which the Indian title has been or shall be extinguished, shall be subject to the operation of the pre-emption act of the 4th of September*, 1841: *Provided, however*, That when *unsurveyed lands* are claimed by pre-emption, notice of the specific tracts shall be filed within six months after the survey has been made in the field."

As a part of the same system, and, as must undoubtedly be apparent, *for the very purpose of securing the object of these acts*, Congress inserted in the Indian appropriation act of March 3, 1863, (12 Stat., 793, secs. 4, 5,) these provisions:

"SEC. 4. That the President of the United States be, and is hereby, authorized to enter into treaties with the several tribes of Indians, respectively, now residing in the State of Kansas, providing for the extinction of their titles to *lands held in common* within said State, and for the removal of such Indians of said tribes as hold their lands in common to suitable localities elsewhere, within the territorial limits of the United States, and outside the limits of any State.

"SEC. 5. That the President of the United States be, and is hereby, authorized to enter into negotiations, by treaty or otherwise, with such loyal tribes, or the loyal portions of such tribes now residing in the country south of Kan-

sas and west of Arkansas, commonly known as the Indian country, as may be necessary in order to secure for the Indians of Kansas, who shall be removed to said Indian country under the provisions of the preceding section of this act, the title to the lands to which they may be so removed.

These acts determined what should be done with Indian lands "*held in common.*" They proceeded upon the idea manifest in all legislation in relation to Indians, that they and the lands they occupy are in all respects subject to legislative control. These acts are applicable to the neutral lands, because they were Indian lands *held in common.* As to treaty engagements *made prior to May* 30, 1854, the act of that date, to organize the Territories of Kansas and Nebraska, (10 Stat., 290, sec. 37,) declared—

"That all treaties, laws, and other engagements made by the Government of the United States with the Indian tribes, inhabiting the Territories embraced within this act, shall be faithfully and rigidly observed, notwithstanding anything contained in this act."

And see act December 22, 1854, (10 Stat., 599;) 10 Opinions, 508. But this was only declaratory of the effect of that act, and gave treaties no new sanction. It did not relieve them from the obigatory force of prior acts. For the purpose of executing the provisions of treaties giving "*separate selections of land,*" which were invalid unless authorized or ratified expressly by act of Congress, and to give to the Secretary of the Interior a power *which no treaty could give him,* the civil appropriation act of March 3, 1859, (11 Stat., 431, sec. 11,) provided:

"That in all cases where, by the terms of any Indian treaty in Kansas Territory, said Indians are entitled to *separate selections* for their benefit, the Secretary of the Interior is hereby authorized to cause patents therefor to issue to such Indian or Indians and their heirs, upon such conditions and limitation, and under such guards or restrictions, as may be prescribed by said Secretary: *Provided,* That nothing herein contained shall be construed to apply to the New York Indians, or to affect their rights under the treaty made by them in eighteen hundred and thirty-eight, at Buffalo creek."

This was equivalent to a declaration that no patents should issue by virtue of any treaty, except as authorized by that act. Other acts all *in pari materia* were a part of this same system. They are acts designed to prohibit the Indians even from attempting to sell their *possessory right* over lands to any purchaser except only to the United States, and that only by treaty held "under the authority of the United

States"—under the authority of *an act of Congress*, as was the practice, during the Continental Congress, under the Articles of Confederation, and since under the Constitution.

Among these acts was that of July 22, 1790, (1 Stat., 138,) which was limited in its duration; the similar act of March 30, 1802, (2 Stat., 141, sec. 12,) applicable to all Indian lands; and the similar act of June 30, 1834, (4 Stat., 129, sec. 12.)

These, of course, were controlled in their operation, too, by the acts of 1854 and 1862, making all Indian lands held in common subject to pre-emption.

Here, then, are the laws which determined the whole land policy as to Kansas.

Where treaties had agreed that separate selections of land should be granted to individual Indians, provisions were made accordingly.

But all lands occupied by Indians in common, including several Indian reservations, were dedicated to actual settlement under the pre-emption acts, &c. And settlers were *invited* to go on the lands while yet they were "unsurveyed."

In the face of all this, the Cherokee treaty of July 19, 1866, (14 Stat., 799,) was made. It contains a multitude of provisions, and in an obscure *proviso* lies buried its great purpose. It begins:

"Articles of *agreement* and convention at the city of Washington on the nineteenth day of July, in the year of our Lord one thousand eight hundred and sixty-six, between the United States, represented by Dennis N. Cooley, Commissioner of Indian Affairs [and] Elijah Sells, Superintendent of Indian Affairs for the southern superintendency, and the Cherokee nation of Indians, represented by its delegates, James McDaniel, Smith Christie, White Cutcher, S. H. Bings, J. B. Jones, and Daniel H. Ross, John Ross, principal chief of the Cherokees, being too unwell to join in this negotiation.

"PREAMBLE.

"Whereas existing treaties between the United States and the Cherokee nation are deemed to be insufficient, the said contracting parties *agree as follows*," &c., &c.

Article XVII of the treaty as first made was as follows:

"The Cherokee nation hereby cedes, in trust, to the United States the tract of land in the State of Kansas, which was sold to the Cherokees by the United States under the provisions of the second article of the treaty of 1835, and also that strip of land ceded to the nation by the fourth article of said treaty, which is included in the State of Kansas; and the Cherokees consent that said lands may be included in the limits and jurisdiction of the said State.

"The lands herein ceded shall be surveyed as the public lands of the United

States are surveyed, under the direction of the Commissioner of the General Land Office, and shall be appraised by two disinterested persons, one to be designated by the Cherokee National Council, and one by the Secretary of the Interior; and in case of disagreement, by a third person, to be mutually selected by the aforesaid appraisers; the appraisement to be not less than an average of one dollar and a quarter per acre, exclusive of improvements.

"And the Secretary of the Interior shall, from time to time, as such surveys and appraisements are approved by him, after due advertisements for sealed bids, sell such lands to the highest bidders, for cash, in parcels not exceeding one hundred and sixty acres, and not less than the appraised value: *Provided*, That, whenever there are improvements of the value of fifty dollars made on the lands not being mineral, and owned and personally occupied by any person, for agricultural purposes, at the date of the signing hereof, such person so owning and in person residing on such improvements shall, after due proof, made under such regulations as the Secretary of the Interior may prescribe, be entitled to buy, at the appraised value, the smallest quantity of land in legal subdivisions, which will include his improvements, not exceeding in the aggregate one hundred and sixty acres; the expenses of survey and appraisement to be paid by the Secretary out of the proceeds of sale of said land: *Provided*, That nothing in this article shall prevent the Secretary of the Interior from selling the whole of said neutral lands in a body to any responsible party, for cash, for a sum not less than eight hundred thousand dollars."

This was amended as follows:

"Amendment 2. Strike out the last proviso in article 17, and insert in lieu thereof the following: '*Provided*, That nothing in this article shall prevent the Secretary of the Interior from selling the whole of said lands not occupied by actual settlers at the date of the ratification of this treaty, not exceeding one hundred and sixty acres to each person entitled to pre-emption under the pre-emption laws of the United States, in a body, to any responsible party, for cash, for a sum not less than one dollar per acre.'"

It will be observed the original treaty *proviso* related to a sale of the "neutral lands;" but the amended treaty extends it to other lands or in terms so declares.

By this provision the Cherokee possessory right is "*extinguished.*" On the ratification of the treaty they "*abandoned*" the lands. This is averred in the bill in this *case*. and is admitted by *the demurrer*. There are other provisions of the treaty which operate or assume to operate *in præsenti*, as article XI, which says, "the Cherokee nation hereby grant a right of way," &c.

But as to the *duties* to be performed by the Secretary of the Interior, the treaty provisions are a *mere agreement*. This is made so by the *preamble*, by agreements all through the treaty, and results from the lessons of Indian and American history; from the legislative practice of Congress; from the fact that the Secretary is a statutory officer, with powers *created*, *defined*, and *limited* by act of Congress, from a *consti-*

tutional incapacity to become an officer for *treaty* duties unless the office should be created by act of Congress and he be "*appointed*" *quo ad hoc* "by the President, by and with the advice and consent of the Senate," to exercise the *new office*, consisting of the treaty duties, and by a constitutional and statutory *prohibition*, *regulation*, and *limitation* of the treaty power to dispose of, or require the disposition of, the fee simple of the public lands.

The history in part of what has been done as to these lands *since* the treaty of 1866 is stated in the bill in this case, and House Report No. 12, 3d session 41st Congress. This report was adopted January 18, 1871, by the Committee on Public Lands, as appears from the journal of the committee. For the purpose *only* of inviting attention to the supplemental Cherokee treaty, I quote from the report as follows:

"Assuming to act under this treaty of August 11, 1866, but in violation of one of its important provisions, which was to sell 'in a body' 'the whole of said lands not occupied by actual settlers,' without 'due notice' having been previously given, a contract was made and entered into, on the 30th day of August, 1866, by James Harlan, then Secretary of the Interior, on the one part, and H. Chamberlain, director and attorney in fact for the American Emigrant Company, on the other part, (a corporation said to have been chartered and existing under the laws of the State of Connecticut,) 'for the sale of the so-called "Cherokee neutral lands," in the State of Kansas, containing eight hundred thousand acres, more or less.' These were only *a part of the lands ceded* by said treaty of August 30, 1866.

"James Harlan passed out of office within forty-eight hours after this attempted sale. On the opinion and advice of Attorney General Stanbery, of October 4, 1866, Harlan's attempted sale of these lands to the American Emigrant Company was, on the 20th of October, 1866, held to be null and void, and Mr. Chamberlain duly notified thereof by Harlan's successor in office, Orville H. Browning, and on the 9th day of October, 1867, Secretary Browning, without official notice or authority of law, entered into a contract for the sale of these same lands to James F. Joy, of Detroit, Michigan."

Following this came the supplemental Cherokee treaty of April 27, 1868, speedily proclaimed June 10, but never published in the volumes of laws. From this treaty I quote as follows:

"Whereas, under the provisions of the 17th article of a treaty and amendments thereto, made between the United States and the Cherokee nation of Indians, and proclaimed August 11, A. D. 1866, a contract was made and entered into by James Harlan, Secretary of the Interior, in behalf of the United States, of the one part, and by the American Emigrant Company, a corporation chartered and existing under the laws of the State of Connecticut, of the other part, dated August 30, A. D. 1866, for the sale of the so-called 'Cherokee neutral lands' in the State of Kansas, containing eight hundred thousand acres, more or less, with the limitations and restrictions set forth in the said 17th

article of said treaty, as amended, on the terms and conditions therein mentioned, which contract is now on file in the Department of the Interior; and whereas Orville H. Browning, Secretary of the Interior, regarding said sale as illegal and not in conformity with said treaty and amendments thereto, did, on the ninth day of October, A. D. 1867, for and in behalf of the United States, enter into a contract with James F. Joy, of the city of Detroit, Michigan, for the sale of the aforesaid lands, on the terms and conditions in said contract set forth, and which is on file in the Department of the Interior; and whereas for the purpose of enabling the Secretary of the Interior, as trustee for the Cherokee nation of Indians, to collect the proceeds of sales of said lands and invest the same for the benefit of said Indians, and for the purpose of preventing litigation and of harmonizing the conflicting interests of the said American Emigrant Company and of the said James F. Joy, it is the desire of all the parties in interest that said American Emigrant Company shall assign their said contract and all their right, title, claim, and interest in and to the said 'Cherokee neutral lands' to the said James F. Joy, and that the said Joy shall assume and conform to all the obligations of said company under their said contract as hereinafter modified;

"It is therefore *agreed* by and between Nathaniel G. Taylor, commissioner on the part of the United States of America, and Lewis Downing, H. D. Reese, Wm. P. Adair, Elias C. Boudinot, J. A Scales, Archie Scraper, J. Porum Davis, and Samuel Smith, commissioners on the part of the Cherokee nation of Indians, that an assignment of the contract made and entered into on the 30th day of August, A. D. 1866, by and between James Harlan, Secretary of the Interior, for and in behalf of the United States of America, of the one part, and the American Emigrant Company, a corporation chartered and existing under the laws of the State of Connecticut, of the other part, and now on file in the Department of the Interior, to James F. Joy, of the city of Detroit, Michigan, shall be made, and that said contract, as hereinafter modified, be, and the same is hereby, with the consent of all parties, reaffirmed and declared valid; and that the contract entered into by and between Orville H. Browning, for and in behalf of the United States, of the one part, and James F. Joy, of the city of Detroit, Michigan, of the other part, on the 9th day of October, A. D. 1867, and now on file in the Department of the Interior, shall be relinquished and canceled by the said James F. Joy, or his duly-authorized agent or attorney; and the said first contract, as hereinafter modified, and the assignment of the first contract, and the relinquishment of the second contract, are hereby ratified and confirmed, whenever said assignment of the first contract and the relinquishment of the second shall be entered of record in the Department of the Interior, and when the said James F. Joy shall have accepted said assignment, and shall have entered into a contract with the Secretary of the Interior to assume and perform all obligations of the said American Emigrant Company under said first named contract as hereinafter modified.

"The modifications hereinafter mentioned of said contract are hereby declared to be—

"1. That within ten days from the ratification of this supplemental article, the sum of seventy-five thousand dollars shall be paid to the Secretary of the Interior, as trustee for the Cherokee nation of Indians.

"2. That the other deferred payments, specified in said contract, shall be paid when they respectively fall due, with interest only from date of the ratification hereof. It is further agreed and distinctly understood that, under the conveyance of the 'Cherokee neutral lands' to the said American Emigrant Company, 'with all beneficial interest therein,' as set forth in said contract, the said company and their assignees shall take only the residue of said lands, after securing to 'actual settlers' the lands to which they are entitled under the provisions of the 17th article, and amendments thereto, of the said Cherokee treaty of August 11th, 1866. And that the proceeds of the sale of said lands, so occupied, at the date of said treaty, by 'actual sett'ers,' shall inure

to the sole benefit of, and be retained by, the Secretary of the Interior, as trustee for the said Cherokee nation of Indians."

The following is the contract between Secretary Browning and J. F. Joy:

"This agreement, made and entered into this ninth day of October, in the year of our Lord one thousand eight hundred and sixty-seven, by and between Orville H. Browning, Secretary of the Interior, and James F. Joy, of the city of Detroit, in the State of Michigan, witnesseth: Whereas, by the seventeenth article of a treaty between the United States of America and the Cherokee nation of Indians, made and concluded on the nineteenth day of July, A. D. 1866, and proclaimed on the eleventh day of August in said year, and the two several provisos to the said section annexed, there were ceded in trust to the United States certain parcels of land therein mentioned, with power to the Secretary of the Interior to sell all of the said ceded lands, with the exception of such parts thereof as are embraced within the tenor and effect of the said two provisions to the seventeenth article of said treaty, for cash, for the sum of not less than one dollar per acre; and whereas the said James F. Joy has proposed to become the purchaser of said lands, and has for that purpose offered to pay therefor the sum of one dollar per acre in cash, which is, in the opinion of the Secretary of the Interior, an eligible and satisfactory price for the same; and whereas the quantity of land embraced within the exception as aforesaid is as yet unascertained, by reason whereof the number of acres of said ceded lands which the Secretary of the Interior is authorized to sell in the manner and at the price aforesaid remains for the present unknown:

"Now, therefore, I, Orville H. Browning, Secretary of the Interior, acting for and on behalf of the United States, and by virtue of the power upon me by the said treaty in that behalf conferred, do hereby agree to and with the said James F. Foy to sell unto him, his heirs and assigns, all of the hereinbefore mentioned lands which were by the seventeenth section of said treaty ceded in trust to the United States, with the exception of such parts thereof as are embraced within the tenor and effect of the said two provisos to the seventeenth section of said treaty, and which parts of said ceded lands are not included in this contract, at and for the sum of one dollar per acre in cash, payable and to be paid as soon as the number of acres hereby contracted to be sold is ascertained, and that on the full payment of the said purchase-money a patent or patents shall be in due form issued, granting the same unto the said James F. Joy, his heirs and assigns: *Provided, however*, That this contract is made subject to the rights reserved by the nineteenth article of said treaty to such of the Cherokees as, being heads of families, resided, at the date of the ratification of said treaty, on any of the said ceded lands.

"And the said James F. Joy hereby, on his part, agrees to pay unto the Secretary of the Interior, or to such other officer of the Government of the United States as may be authorized to receive the same, the sum of one dollar in cash for each acre of land by this instrument contracted to be sold, as soon as the number of said acres shall be ascertained, and also to pay, for the benefit of such of the Cherokees as, being heads of families, resided on any of the said ceded lands at the date of the ratification of said treaty, and desire to remove from the same, the value of their improvements thereon reserved to them by the nineteenth article of said treaty, as soon as such value is ascertained in the manner provided in said article.

"In witness whereof I, Orville H. Browning, Secretary of the Interior, have subscribed my name and caused the seal of said department to be affixed hereunto; and the said James F. Joy has hereto, on his part, subscribed his name. All done in duplicate the day and year first above written.

[SEAL.]

"O. H. BROWNING,
"*Secretary of the Interior.*
"JAMES F. JOY,
"By N. BUSHNELL, *his agent.*"

After the Indian title was "*extinguished*" by the treaty of 1866, and *before* the supplemental treaty was concluded, many settlers went on these lands, invited there by the acts to which I have referred.

They took and have continued possession for the purpose of complying with and procuring title under the pre-emption acts, &c. But the local land offices were closed against them, and they were denied the opportunity to make proof or payment. Peter J. Holden, the complainant, is one of this class of "settlers."

It is shown in House Report No. 5, 3d Session 41st Congress, January 11, 1871, that under and by virtue of these treaties, and without other authority, patents were issued to James F. Joy October 31, 1868, January 6 and February 19, 1869, and November 2, 1870, in all for 639,658 $\frac{59}{100}$ acres, and there have been awarded to three distinct classes of settlers—part residing on the lands at the date of the treaty of 1866, and a part at its ratification—154,395 $\frac{12}{100}$ acres, under the provisions of article XVII, and by reason of the official action of the Secretary of the Interior under that article, and *in obedience* to *the pre-emption laws* and article XII of the treaty. These patents to Joy recite the treaties as the only authority upon which they are issued.

The land in controversey in this case is covered by the patent of October 31, 1868, a copy of which is annexed to the bill.

If this patent gives James F. Joy a valid title, that will be decisive of this case. But if it was issued without authority, or in violation of law, it is void, and, no matter what may be the right of the settler in possession, Joy cannot hold any land by virtue of it.

LEGAL PROPOSITIONS STATED.

And now, upon the facts of the case, I maintain as legal propositions—

I.

Neither the Cherokee treaty nor the contracts therein mentioned purport to, or can *ex proprio vigore*, grant a fee simple

or legal title in these lands to James F. Joy. And so far as they *stipulate* for the survey or selection of the lands, the receipt of payment therefor, or the execution of the treaty trust, as conditions precedent to the right to land patents, and necessary to determine the lands to be patented, they cannot be executed until authorized by act of Congress; and there is no act on that subject.

II.

The *treaty* does not purport to nor in fact authorize the issuing of land patents, nor otherwise provide for passing the legal title in the lands from the United States. Nor is it aided by any act of Congress.

III.

If this treaty were even in a *form* to be an operative law, as it is not prescribing official duties, or conferring official powers, yet it cannot under the Constitution impose on statutory officers the official duties, or confer the powers required for its execution. Nor is it aided by any act of Congress.

IV.

This treaty, so far as it *stipulates* for a sale of lands, is void, because in conflict with the act of July 22, 1854, (10 Stat., 310,) and the act of June 2, 1862, (12 Stat., 413,) both of which were enacted by Congress in the exercise of the power to *dispose of the public lands*, to legislate *as to the Indians*, and to *regulate the Indian treaty power*.

V.

If this treaty were in a form to be operative as a law, requiring a sale of these lands, as it is not, yet it is unconstitutional and void, so far as it attempts to dispose of the lands in the forms prescribed. And this is so, no matter what may be the character of the Indian claim in these lands prior to the cession. No act of Congress has authorized or validated this attempted treaty sale.

If I am correct in *any one* of these positions, then James F. Joy has no title.

OFFICIAL DUTIES REQUIRED BY TREATY.

An examination of the treaty stipulations will show the necessity for legislation to execute them.

The XVIIth article of the treaty of 1866 *stipulates*—

1. "The lands * * shall be surveyed as the public lands * * are surveyed."

2. This shall be done "under the direction of the Commissioner of the General Land Office."

3. The lands "shall be appraised by two persons."

4. The appraiser shall "be designated, one by the Cherokee Council, and one by the Secretary of the Interior; and in case of disagreement, a third person to be mutually selected by the aforesaid appraisers."

5. "The Secretary of the Interior shall approve the surveys and appraisements."

6. He shall, "from time to time, after due advertisement for sealed bids, sell such lands to the highest bidders for cash, in parcels not exceeding 160 acres, at not less than the appraised value."

7. Provided that occupants at the date of the treaty, having respectively improvements worth $50 on a quarter section, shall, after "due proof," made under "such regulations as the Secretary of the Interior may prescribe, be entitled to buy at the appraised value" the land so occupied.

8. The expense of survey and appraisment to be paid by the Secretary out of the proceeds of sales.

9. Provided that nothing in the article shall "*prevent*" the Secretary from selling all the lands to a responsible party.

10. But the Secretary shall except from sale, in addition to the "$50 improvement settlers'" lands, a quarter section occupied by each settler at the ratification of the treaty, entitled to pre-emption under the pre-emption laws.

11. The *contract* referred to in the treaty *stipulates* that, "on full payment of said purchase money, a patent or patents shall be in due form issued, granting the same unto the said James F. Joy, his heirs and assigns."

12. The lands claimed under article XIX are to be selected, proofs received, &c.

Now, here are stipulations involving the appointment of officers, not as the Constitution requires, by the President by consent of the Senate, the performance of executive and administrative duties of officers, the selection of lands, determination of the rights of settlers under the pre-emption laws by an officer other than those prescribed by law, the disposal of the public lands, the expenditure of a portion of the proceeds, an appropriation of money without law, and a great variety of objects. If all this can be done by an Indian treaty, then the Indian treaty power can set up an *imperium in imperio*, which will rival, if it does not annihilate, the powers of the national Government. And I insist that, before these stipulations can be executed or their object accomplished, there must be an act of Congress to authorize it. This results from the *form of the treaty* and from the *character of its subject-matter.*

THE TREATY IN FORM AN AGREEMENT, NOT A LAW.

As to all the objects I have enumerated, the treaty is *in form* a *mere agreement.* The treaty begins:

"Articles of *agreement* and convention at the city of Washington," &c., &c.

Then follows a preamble:

"Whereas existing treaties between the United States and the Cherokee nation are deemed to be insufficient, the said contracting parties *agree as follows.*"

Then follow various articles.

The XVIIth makes a cession of these lands to the United States absolute, *in præsenti*, and then follows a subject-matter of *stipulation* that—

"The lands *herein ceded* shall be surveyed, &c., and appraised, &c. And the Secretary shall sell," &c.

With this statement of the facts, I proceed to consider the several propositions stated. Each one involves considerations common to all, but I prefer to consider them separately.

THE LEGAL ARGUMENT.

PROPOSITION I.

An act of Congress is necessary before the treaty, survey,

selection of lands, receipt of payment therefor, or the performance of the treaty trust to sell can be executed.

That the treaty does not *ex proprio vigore* convey any fee simple or legal title to James F. Joy needs no argument to to prove.

That the treaty is in form a *mere agreement* must be apparent on the face of it. If there could be doubt about it, the doubt ought to be resolved in favor of holding it in form an agreement. For it is certain that if it is to operate as a law *in form*, even for the purpose of authorizing a sale, or the acts necessary to survey the lands, and select and separate the three classes into which the treaty divides them and receive payment, it clearly operates on a subject the whole of which is intrusted to Congress by the Constitution.

In other words, the treaty attempts to do what Congress undoubtedly could do. And as it is not to be presumed that the treaty power would attempt to exercise legislative power, the treaty ought to be construed so as to make it an *agreement* merely.

Assuming that it will be so construed, it cannot be executed without the aid of an act of Congress passed for that purpose.

This question, I submit, is settled by the courts.

The VIIIth article of the treaty with Spain of February 22, 1819, provides that—

"All the grants of land made before the 24th of January, 1818, by His Catholic Majesty, &c., shall be ratified and confirmed to the persons in possession of the lands to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty."

This is the treaty by which Florida was ceded to the United States.

By the treaty of St. Ildefonso, October 1, 1800, Spain ceded Louisiana to France, and France, by treaty of 1802, ceded it to the United States. Under this treaty the United States claimed the countries between the Iberville and the Perdido, and extended a government over it by act of Congress. Spain claimed the same territory, and after the treaty of 1800 His Catholic Majesty of Spain granted lands in the disputed territory.

In *Foster & Elam* v. *Neilson*, 2 Peters, 253, the question to

be decided was whether the VIIIth article of the treaty of 1819 operated as a *law* to ratify and confirm a title so granted.

Chief Justice Marshall, referring to the VIIIth article of the treaty said:

"Do these words act directly on the grants, so as to give validity to those not otherwise *valid*, or do they pledge the faith of the United States to pass acts which shall ratify and confirm them?

"A treaty is, in its nature, a contract between two nations; not a legislative act. It does not generally effect of itself the object to be accomplished, especially so far as its operation is *infraterritorial*, but is carried into execution by the sovereign power of the respective parties to the instrument.

"In the United States a different principle is established. [But see Annals of Congress for 1796, p. 525; Federalist, No. 52, p. 63; 1 Benton Abr., 643.] Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded, *in courts of justice*, equivalent to an act of the legislature, *whenever it operates of itself without the aid of any legislative provisions*. But when the terms of the stipulation import a contract, when either of the parties engage *to perform a particular act*, the treaty addresses itself to the political, not the judicial, department, and *the legislature must execute the contract before it can become a rule for the court*. The article does not declare that all grants made shall be valid. It does not say that these grants *are hereby confirmed*. Had such been its language, it would have acted directly on the subject, &c."

This language was cited with approval in *United States* v. *Arredondo*, 6 Peters, 735. In *United States* v. *Perchman*, 7 Peters, 88, and *Garcia* v. *Lee*, 12 Peters, 520, similar questions arose, and, upon a translation of the Spanish treaty, it was held to have a different effect; but the principle announced by Chief Justice Marshall was not controverted.

It will be seen the case in 2 Peters does not rest on the ground merely that the treaty of 1819 was a *stipulation* for *legislative acts to be passed.*

But it is upon the further doctrine that a treaty is only operative to confer a right which can be recognized in courts when it acts "*directly on the subject.*"

And what is meant by a treaty acting "*directly on the subject?*"

Chief Justice Marshall answers the question: "It would have acted directly on the subject," if it had said "that these grants *are hereby confirmed.*"

And, says Chief Justice Marshall, when by a treaty "either party *engages to perform a particular act*, the treaty addresses itself to the political, not the judicial, department, *and the legislature must execute the contract.*"

Now, to apply that principle to this case.

Without now considering the question whether an *Indian treaty* can accomplish *infraterritorally* as to the public lands what *an international treaty* can accomplish as to territories ceded by one party and acquired by the other, I will apply the principle of Chief Justice Marshall's decision to these laws.

The Cherokee treaty would have "acted directly on the subject," if it had designated lands by proper identification, and then declared:

"Said lands *are hereby granted* to James F. Joy, his heirs and assigns."

But it did not do this.

It did *engage* or *stipulate* that "one of the parties"—the United States, by their officers, &c.—should survey, appraise, select lands, allot some to the "fifty dollar improvement settlers," some to "pre-emption settlers," some to "Cherokee heads of families," and the residue to James F. Foy, on conditions to be performed and accepted *in futuro.*

Here were "*particular acts*" stipulated to be performed.

And Chief Justice Marshall says:

"When either of the parties (to the treaty) engages to perform a *particular act,* * * the legislature must execute the contract."

The treaty with Spain was very similar in principle to the Cherokee treaty. The Spanish King had made many grants of land. Some were confessedly incomplete. Their extent was to be ascertained. All this was a *subject-matter* requiring legislation.

The same principle was again decided in *Taylor* v. *Morton,* 2 Curtis C. C. R., 454.

The VIth article of the treaty with Russia of September, 1832, (8 Stat., 446,) provides that—

"No higher or other duties shall be imposed on the importation into the United States of any article the produce or manufacture of Russia; and no higher or other duties shall be imposed on the importation into the empire of Russia of any article the produce or manufacture of the United States than are or shall be payable on the like article being the produce or manufacture of any other foreign country."

Judge Curtis, in that case, referring to the treaty, said:

"Though the treaty with Russia of December 18, 1832, (8 Statutes at Large, 444,) stipulated that no higher rate of duties should be imposed on goods imported from Russia than on like articles imported from other places, this court cannot try the question whether a certain species of hemp, on which a duty of twenty-five dollars per ton is imposed by an act of Congress, is, like Russian

hemp, within the meaning of the treaty. This is a question for Congress, not the courts.

"The truth is, that clause in the treaty is merely *a contract addressing itself to the legislative power.* The distinction between such treaties, and those which operate as laws *in courts of justice*, is settled in our jurisprudence."

This case did not turn upon the proposition that the treaty *stipulated for legislation.*

The treaty was in a *form* sufficiently proper for a statute prescribing rates of duties, but after all it was an *agreement* on that subject; and because it was so, and because it was on a subject-matter the power over which was expressly delegated to Congress, an act of Congress was necessary to execute it.

The case of *Turner* v. *Am. B. M. U.*, 5 McLean, 344, proves the same position. An Indian treaty provided that "the net proceeds of the sale" of a designated tract of one hundred and sixty acres of land "shall be paid to" a certain society.

Judge McLean said:

"Without a law [act of Congress] the President is not authorized to sell the public lands, so that this treaty, though so far as the Indians were concerned, was the supreme law of the land, yet, as regards the right to the proceeds of the above tract, an act of Congress is required. The treaty in fact appropriates the above tract of one hundred and sixty acres for a particular purpose, but to effectuate that purpose an act of Congress was passed. * * *

"A treaty under the federal Constitution is declared to be the supreme law of the land. This unquestionably applies to all treaties where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and cannot be, the supreme law of the land where the concurrence of Congress is necessary to give effect. Nor *can the courts* act under it, for the purpose of enforcing its provisions, *except in pursuance of a statute.*

"The provision in the Constitution of the United States which declares that the Constitution and the laws made in pursuance thereof, and all treaties made, or which shall be made, the authority of the United States shall be the supreme law of the land, *does not, ex proprio vigore*, without *legislative* enactment, confer upon the *officers of the national Government the power of executing the stipulations of a treaty.* Where a treaty contains a proviso importing a contract that its terms shall at some future period be ratified and confirmed, such treaty does not execute itself, but it must be executed by an act of Congress before it can become a rule for the decision of the courts." (See 5 Howard, 176.)

(See *Longlois* v. *Coffin*, 1 Indiana, 446; *Verden* v. *Colman*, 4 Ind., 457; *Haden* v. *Ware*, 15 Ala., 158; *Fipp* v. *McGehee*, 1 Ala., 173.)

This Cherokee treaty contains inherent evidence that the provisions relating to a sale of lands were designed to be addressed to the legislative discretion, and were not intended to be operative *per se.* Article XI grants a right of way by

the words "the Cherokee nation *hereby grant* a right of way," &c.

The XVIIth article says, "the Cherokee nation hereby cedes," &c. These are in form operative *per se*. The XVIIth article is on a proper subject of treaty jurisdiction, so far as it extinguishes the Indian title.

But all the provisions under which Joy claims title are not in the form of a law, but mere stipulations. The reason for this difference in the form of the provisions must be apparent, and its purpose must be carried out. These positions necessarily result from the fact that the power to provide for the execution of treaties *is a legislative* power, has always been so regarded in England, and is expressly delegated to Congress in the words—

"To make all laws * * necessary and proper for carrying into execution * * all powers vested in the Government or any department or office thereof."

But this view of the subject I will more fully consider hereafter under other heads, and especially will this appear by reference to the numerous acts of Parliament and Congress to carry into execution treaties, and particularly acts of Congress *to execute Indian treaties*.

Even an act of Congress may be *executory*. The act of March 2, 1819, which provided that section 16 "shall be granted," &c., was held inoperative *per se*. (3 Opinions, 56.)

Proposition II.

*James F. Joy has acquired no legal or fee simple title in the lands, because there is no treaty or other authority to issue a patent.**

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* A patent issued without authority of law is void, and the courts may inquire into *conflicting claims* resting on *questions of law*.
Stoddard v. *Chambers*, 2 Howard, 284.
Doe v. *Files*, 3 Ala., 47.
Hunter v. *Hemphill*, 6 Mis., 106.
Hit-tuk-ho-mi v. *Walls*, 7 S. & M., 363.
Perry v. *O'Hanlan*, 11 Mis., 585.
People v. *Livingston*, 8 Barb., S. Ct., 253.
Wright v. *Rutgers*, 14 Mis., 585.
Gaston v. *Canada*, 39 Mo., 357.
U. S. v. *Stone*, 2 Wallace, 525.
Lindsey v. *Hames*, 2 Black, 554.
State v. *Backelder*, 1 Wallace, 109; 5 Min., 223.

The treaty *per se* does not profess to pass any legal or fee simple title from the United States. It is entirely silent on the subject of a patent, or as to the mode in which the title held by the United States shall pass to Joy.

The supplemental treaty professes to ratify *a contract* on file in the Interior Department.

It cannnt be *presumed* that this document hid away from courts, and not legally brought to the notice of officers—inaccessible to all the world—confers any authority, or is in a form to be a law.

A copy of this contract is made an exhibit to the bill in this case, and it contains this clause:

"I, Orville H. Browning, Secretary of the Interior, acting for and on behalf of the United States, and by virtue of the power upon me by said treaty conferred, do hereby agree to and with James F. Joy to sell to him, his heirs and assigns, part of the neutral lands, to be ascertained at one dollar per acre, * * and that, on the full payment of the said purchase money, a patent or patents shall be in due form issued, granting the same unto the said James F. Joy, his heirs and assigns."

O'Brien v. *Perry*, 1 Black, 132.
Clemens v. *Warner*, 24 Howard, 394.
Garland v. *Wynn*, 20 Howard, 6.
Barnard v. *Ashley*, 18 How., 43.
Gingrich v. *Foltz*, 19 Pa., (7 Harris,) 38.
Report Commissioner General Land Office, 1868, p. 126.
Pollock v. *Wendall*, Cranch' 87; 5 Wheat., 301.
Opinions of Attorneys General, vol. 5. p. 7.

"It is evidently, therefore, the view of the Supreme Court, that a patent issued without authority of law, or against law, is not voidable merely, but void, and being, therefore, a nullity as though it did not exist, it leaves the duty unimpaired to convey the title to the rightful owner. * * * It is an undoubted proposition that, if a patent be issued without authority of law, it is utterly void. Not being an act done in a court of record, there is no difficulty in the way of treating it as merely void."

"2 Howard, p. 284, the court held that * * * the title of the confirmee was made perfect by the act of confirmation, and without any patent as against the prior patent, which was simply void; and that if the two patents be issued by the United States for the same land, and the first in date be obtained fraudulently or against law, it does not carry the legal title. (See Lester's Land Laws, p. 660.)

"*Ross* v. *Borland*, 1 Peters, p. 656, the court held that 'the second patent issued upon legal authority; the first did not; and therefore the second must prevail.'

"*Brown* v. *Clements*, 3 Howard, p. 650, it was directly adjudged by the Supreme Court that 'the second patent prevailed over the first, where the first was not legally issued.'

"See letter of Secretary of the Interior to the Commissioner of the General Land Office, September 29, 1859. Same to same, March 31, 1859. (Lester's Land Laws, pp. 394, 451.) See also Opinions, vol. 4, p. 558, and 14 Missouri, p. 585."

Assuming the validity of the treaty and the contract, which I deny, the most that could be claimed is, that they gave to Joy an *inchoate* claim. There is no title, not even a *vested* equity. Before any equity could vest, lands were to be surveyed, selected, and various acts to be performed.

And when all this was done, how shall the inchoate claim be converted into a vested equity or a legal title? How shall the fee simple pass from the United States?

Upon that subject the treaty is silent. It confers no power. It makes no law for its own execution.

As to "separate selections" of land, which certain Cherokee heads of families were entitled to make under the treaty, it is provided that each head of a family—

"Art. XIX. Shall be entitled to receive a patent from the United States, in fee simple, for three hundred and twenty acres of land, to include his improvements."

But even as to them, within the principle announced by Chief Justice Marshall in *Foster & Elam* v. *Neilson*, 2 Peters, this is only an *engagement* to "perform a particular act," and "addresses itself to the political, not the judicial, [or executive,] department, and the legislature must execute the contract before it can become a rule of the court." It is not a *law*.

It does not even declare *who* shall issue the patents. It does not say whether the President or the Secretary of the Interior, nor does it confer or purport to confer power on either.

In such cases it has been deemed necessary to have the authority of an act of Congress. The act of March 3, 1859, (11 Stat., 430, sec. 11,) provides:

"That in *all cases* where, by the terms of any Indian treaty in Kansas Territory, said *Indians* are entitled to *separate selections* of land and to a patent therefor, under guards, restrictions, or conditions for their benefit, the *Secretary of the Interior* is hereby authorized to cause patents therefor to issue to such Indian or Indians, and their heirs, upon such conditions and limitations and under such guards or restrictions as may be prescribed by said Secretary."

Neither an *international* treaty nor an *Indian* treaty can be a law to *executive officers* of the Government.

But if they could, this contract with Joy cannot be a law to the President to authorize the issue of patents, when the

treaty is totally silent on the subject of patents to Joy, and the contract does not even purport to *confer power* on any officer to issue patents.

This contract is a mere private agreement between the Secretary of the Interior and Joy. To hold that such an instrument is a *law* which can give power to officers is to go beyond any claim ever yet set up by any jurist or statesman of America.

If all the private contracts under treaties filed away in the Indian Office, for the survey of lands, Indian supplies, and multitudinous other engagements, unpublished and inaccessible, are all laws, then, indeed, are their sources as undiscovable as that of the Nile—then, indeed, is the example revived of the king who posted his laws where they could not be read. The Constitution says a *treaty is a* law for certain *purposes*, but it does not go beyond this, and make *contracts* made under treaties also laws. If this can be so, then, indeed, has the law-making power departed from Congress, and lies buried in the breast of selected officers, and at the discretion in part, at least, of savages.

A mere agreement stipulating the performance of future acts cannot be a law at all. If such a law can confer powers on the President, requiring him to issue patents, it can regulate the duties of citizens to Indian tribes, define crimes against them, and usurp all legislative authority. But this agreement does not name the President. It, like the treaty, is totally silent as to *who* shall issue patents. And if a treaty can be a law to executive officers, then the treaty *legislates*, and by the Constitution "*all*" legislative power is vested in Congress.

Upon the authority of the cases already cited from 2 Peters, 253; 2 Curtis, 454; 5 McLean, 344, it is clear there is no power under the treaty or contract with Joy, and without an act of Congress to issue patents or give any evidence of title. And this is equally so because, under the Constitution, Congress has power to provide for the execution of treaties, and a treaty cannot usurp that power. (1 Lester's Land Laws, 32; 4 Stat., 663; 5 Stat., 107; 10 Stat., 599.)

The necessity of an *express statute* to authorize the issuing of patents, even when title had been established by statute, was so well understood that the act of December 22, 1844, (10 Stat., 599,) provided:

"That in any case of any claim to land in any State or Territory which has heretofore been confirmed by law, and in which no provision is made by the confirmatory statute for the issue of patents, it shall and may be lawful, where surveys for the land have been or may hereafter be made, to issue patents for the claims so confirmed, upon the presentation to the Commissioner of the General Land Office of plats of survey thereof, duly approved by the surveyor general of any State or Territory, if the same be found correct by the said Commissioner: *Provided*, That such patents shall only operate as a relinquishment of title on the part of the United States, and shall in no manner interfere with any valid adverse right, if such exist to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land."

The act of May 28, 1830, expressly authorized the President to issue patents.

The Attorney General *ad interim*, in an opinion of July 20, 1863, (10 Opinions, 510,) held that, although the act of May 26, 1860, (12 Stat., 21,) expressly ratified reservations to half-breed Indians, under the VIth article of the Kansas treaty of June 3, 1825, (7 Stat., 245,) yet, inasmuch as it did not expressly authorize the issuing of patents, none could issue. He said:

"There are various kinds of titles to the public lands of the United States, and amongst these a large class consists of titles which derive their validity from express legislation of Congress granting certain *specified lands* to *persons named*. Sometimes this legislation constitutes the only basis and evidence of title, and sometimes it is founded upon a *prior claim of right to the particular land granted*. But in both cases, *unless the issue of a patent was directed by the law which granted it*, it has for a number of years past been the *received opinion* that *no law authorized the issue of a patent*, and such grantees of the public lands have been compelled to dispense with this evidence of title. For remedy Congress passed the act of December 22, 1854. Whether inadverantly or not, *they made that act restrospective only*."

Proposition III.

The Cherokee treaty cannot constitutionally impose the official duties, or confer the official powers on executive officers necessary to execute it, so as to convey a title to lands.

This treaty attempts to confer various powers on, and require duties of, the Secretary of the Interior, the Commissioner of the General Land Office, &c. The performance of these duties are prerequisite to the issuing of a patent. If they

were unauthorized, no patent can issue by reason of them. They could have no more effect than if performed by an untutored savage. It will be convenient to consider this subject under different divisions. I therefore insist—

SUBDIVISION I.—The *treaty power* cannot impose duties or confer powers to be exercised *infraterritorially* even by the President—the executive officer of the Constitution. This can only be done by act of Congress.

SUBDIVISION II.—If the *foreign treaty power* can do so, an *Indian treaty* cannot in *any case*, or certainly not where, as here, the subject-matter of it is in its nature *legislative*.

SUBDIVISION III.—An Indian treaty cannot impose duties or confer powers on the Commissioner of the General Land Office and Secretary of the Interior—mere statutory officers—and especially not when, as in this case, the attempt is made to require the power to be exercised independently of the President.

PROPOSITION III.

SUBDIVISION I.—*The treaty power cannot impose duties or confer powers to be exercised infraterritorially even by the President.*

The Government ordained under the Constitution sustains *international* and *internal* relations.

For *internal* purposes its powers are distributed into legislative, executive, and judicial. For *all internal* purposes Congress *makes laws*, the President *executes* as they require, the courts exercise judicial power. The *international* relations of the Government are regulated by the Constitution, acts of Congress, treaties, and the common law of nations.

The power to "*make*" treaties, Judge Story says—

> "Is neither a legislative nor an executive power. * * Treaties are not *common rules prescribed by the sovereign to his subjects*, but *agreements between sovereign and sovereign*. The treaty-making power, therefore, seems to make a *separate department*, and to belong properly neither to the executive nor the legislative, although it may be said to partake of the qualities common to each."

In this Story follows the authority of Hamilton and Madison. (Federalist, 75; 1 Writings of Madison, 620.)

But treaties are to be *executed*, and they may "affect the rights of parties litigating in courts."

By what *authority* shall *such* rights be *adjudged* and determined?

The Constitution answers this inquiry. It declares that—

"The judicial power shall extend to *all cases* in *law* and *equity* arising under this Constitution, the *laws* of the United States and *treaties*, * * to all *cases* affecting ambassadors, other public ministers and consuls," &c.

When the courts were organized, then, and the judicial power distributed to them by act of Congress, the right of the courts, it has been alleged, became undoubted. If this be so, it became so by *virtue of the clause I have just cited;* not by reason of the clause which declares a treaty to be a supreme law.

If I were to concede that, by force of the Constitution, whenever a treaty "affects the rights of parties litigating in courts," (U. S. v. Schooner Peggy, 1 Cranch, 103,) that it is *in the courts* to be regarded as a *law*, *whether it be in the form of an agreement* or in the *form of a law*, yet this cannot aid the title claimed under the treaty here.

Upon the theory stated the Constitution determines *how far* a treaty is to be regarded by the courts *as a law*. It is to be so regarded in the *national courts*, so far as it "affects the rights of parties litigating" "in law and equity" "cases," because the Constitution extends the judicial power to these subjects.

But there must be at least a *vested equity*, conferred by treaty and operating directly on the subject, before "parties litigating" can be heard in courts, and not merely an *inchoate claim*.

The Cherokee treaty does not *ex proprio vigore* operate on any *designated lands*, but leaves their selection for the future. Now, then, there is no *vested* equity in any specific lands, but only a pretense of an *inchoate claim*.

If an *international treaty* on an international subject, whether in form of an agreement or in form of a law, is to be regarded in the State courts as a law, so far as it "affects the rights of parties litigating," it is because the constitution says—

"The judges in every State shall be bound thereby."

Here, then, it is declared how far treaties are to be regarded by national and State courts.

It is not said that the *President* shall be bound by or execute a treaty, for he can only execute the laws; that is, acts of Congress.

As illustrations of the doctrine that the *courts* have cognizance of *judicial questions*, I refer to *United States* v. *Schooner Peggy*, 1 Cranch, 103; *Society, &c.* v. *New Haven*, 8 Wheat., 464; *Ware* v. *Hylton*, 4 Dallas, 199; *Owing* v. *Norwood*, 5 Cranch, 344. See 8 U. S. Stat., 2, *notes; Anderson* v. *Lewis*, 1 Freem. Ch., 178; *Stockton* v. *Williams*, Walk. Ch., 120.

But all this is only by express provision of the Constitution, and not because a treaty is a *law* to the courts under the clause declaring treaties laws.

And it has been clearly proved that a treaty is not a law to the courts on *all subjects*, even falling within the proper jurisdiction of the treaty power.

In the great debate in Congress of March, 1800, on the extradition of Robbins, it was claimed that the judicial power extended to execute extradition treaties—"to all *questions* arising under the Constitution, treaties, and laws."

But Mr. Marshall, afterwards Chief Justice, proved that the judicial power under treaties extended *only* to "all cases in law and equity," and "where the rights of individuals acquired or secured by a treaty are to be asserted or defended in court."

He said:

"By the Constitution, the judicial power of the United States is extended to all '*cases in law and equity*,' arising under the Constitution, laws, and *treaties* of the United States, but the resolutions [those before the House] declare the judicial power to extend to *all questions* arising under the Constitution, treaties, and laws of the United States. The difference between the Constitution and the resolutions was material and apparent.

"A *case* in law or equity was a term well understood and of limited signification. It was a controversy between parties, which had taken a shape for judicial decision. If the judicial power extended to every *question* under the Constitution, it would involve almost every subject proper for legislative discussion and decision; if to every *question* under the laws and treaties of the United States, it would involve almost every subject on which the executive could act.

"The division of power which the gentlemen have stated could exist no longer, and the other departments would be *swallowed up by the judiciary*.

"But it was apparent that the resolution had essentially misrepresented the Constitution. * *

"By extending the judicial power to all cases in law and equity, the Constitution had never been understood to confer on that department any political power whatever. To come within this description, a question must assume a

legal form for forensic litigation and judicial decision. There must be parties to come into court who can be reached by its process, and bound by its power, whose rights admit of ultimate decision by a tribunal to which they are bound to submit.

"A case in law or equity proper for judicial decision may arise under a treaty where the rights of individuals, acquired or secured by a treaty, are to be asserted or defended in court. As under the fourth or sixth article of the treaty of peace with Great Britain, or under those articles of our late treaties with France, Prussia, and other nations, which secure to the subjects of those nations their property within the United States; or, as would be an article which, instead of stipulating to deliver up an offender, should stipulate his punishment, provided the case was punishable *by the laws* and in the courts of the United States." (Wharton's State Trials, 448.)

Judge Curtis has proved, in his article of 1862, on executive power, that—

"It is a clear and undoubted prerogative of Congress *alone* to define *all* offenses, and to affix to each some appropriate and not cruel or unusual punishment."

Since the debate of 1800, the authority of Chief Justice Marshall, in *Foster & Elam* v. *Neilson*, 2 Pet., 253; of Judge Curtis, in *Taylor* v. *Morton*, 2 Curtis, 454; and of Judge McLean, in *Turner* v. *Am. B. M. U.*, 5 McLean, 344, and other high authorities, show that a treaty stipulation is not always even a law to the courts in law or equity cases, until so determined by act of Congress.

And now let us consider how far the Constitution authorizes *executive officers* to execute the provisions of treaties.

It does *not* declare that the *executive* officers of a State shall be bound by a treaty or regard it as a law to them, nor that it shall be a *law to the President* or other executive officers of the Government, because they can only *execute acts of Congress.*

Treaties involve other subjects than "cases at law or in equity between parties litigating."

There may be *rights of person and questions of property* and international obligations, and duties involved in them, to perfect or determine which the action of executive officers may be necessary.

And how shall such treaties be *executed?* By the President or subordinate officers, without law? Shall they, according to their own arbitrary will, prescribe regulations and execute them, affecting life, liberty, and property, the peace of nations, and the commercial and other interests of the whole people, or shall this be done by or under the authority of Congress?

The Constitution determines this too. But it does not determine it in the clause which says:

"This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

This is aimed at the *State courts* only, as I will more fully show hereafter. The Constitution elsewhere determined how far the *national courts* should be governed by treaties. This clause settles the question as to *State courts*.

In defining *judicial* power, as I have shown, the Constitution *expressly* extends *it* to "*treaties*," so far as they affect rights at law or in equity of parties properly in court. The executive authority, like the judicial, consists of *specific*, *delegated*, *enumerated* powers, which require no act of Congress to vest the authority, and then the Constitution makes a general declaration *where* all *other* executive authority shall be, but leaves Congress by law to determine its jurisdiction and mode of execution. This undefined executive power, which Congress alone can define, is provided for, or rather is permitted to have an existence, by law, in these words:

"The executive power *shall be* vested in a President. * * He shall take care that the *laws* be faithfully executed."

What laws?

He is not to execute *treaties*, except as he executes laws of Congress for that purpose. The Constitution, though giving the *effect* to *international* treaties of supreme laws, so far as the "*judges of the States*" and the *national judiciary* are concerned, and for limited purposes only, yet carefully distinguishes between *treaties* and *laws of Congress*. It provides that—

"No money shall be drawn from the Treasury but in consequence of appropriations made by law."

Here is a regulation of executive duties, and, like all regulations relative to them, refers to *laws of Congress*. The "law" here referred to has always been held to mean *an act of Congress*.

When the Constitution says that the President "shall take care that the *laws* be faithfully executed," the word "*laws*"

is used in the same sense as in the clause relative to appropriations of money.

When the Constitution says "the judicial power shall extend to * * cases * * arising under the Constitution, the *laws* of the United States, and *treaties*," and *omits* to say the President shall execute *treaties* as well as *laws*, the purpose is plain.

The Constitution says nothing about the power of the President to *execute the Constitution*, because *laws* are necessary to execute its provisions. They do not execute themselves.

The constitutional oath of the President requires him to—

"Faithfully execute the *office of President*, * * and * * preserve, protect, and defend the Constitution."

And his *specific*, *enumerated*, *delegated* duties and powers under the Constitution are prescribed:

"The President shall be commander-in-chief of the army and navy.

"He shall have power to grant reprieves and pardons. * * To appoint ambassadors, other public ministers, and consuls, judges, and all other officers * * whose appointments are not herein otherwise provided for, and which shall be established *by law*. But *Congress* may *by law* vest the appointment of * * inferior officers * * in the President, * * courts, or heads of departments."

And here again the Constitution, in defining the powers and duties of the President, uses the word *law* in the sense only of an act of Congress. Upon the maxim *noscitur a sociis*, the word is so used in every case giving power to the President.

And it is because the Constitution does not authorize the President to execute *treaty* stipulations or provisions, that this instrument, after conferring eighteen distinct powers on Congress, then adds the additional authority—

"To make all *laws* which shall be necessary and proper for carrying into execution the foregoing powers, and *all* other powers vested by this Constitution in the Government * * or in any department or officer thereof."

Here is the power to pass laws to execute treaties.

The Constitution does not limit the powers of Congress to *infraterritorial subjects*. It has power—

"To regulate commerce with foreign nations; to define and punish * * offenses against the laws of nations," &c., &c.

When the Constitution says that the President "shall take care that the laws be faithfully executed," this does not, *ex proprio vigore*, clothe him with the power to execute even every act

of Congress, but only such acts as specifically confer the power on him, and such as regulate his express enumerated delegated powers. Judicial power is given to the courts, but except in the *single instance* where the Constitution has *ex proprio vigore* clothed the Supreme Court with *original jurisdiction* in specified cases, no court can exercise jurisdiction by *force of the Constitution*. The powers and jurisdiction of courts must be conferred, or rather apportioned to them by act of Congress.

For the same reason the President has *his original jurisdiction* in *specific, enumerated, delegated* powers, as, for instance, to "grant pardons," and make certain appointments to office; but beyond *this kind* of jurisdiction, his *other* authority, like that of the courts not specifically given by *enumeration* in the Constitution, must depend on an act of Congress. (3 Writings of Madison, 268; 4 *Ib.*, 370.)

The Constitution recognizes as among executive officers acting under the President "heads of departments," (Art. II. sec. 2,) and these have been created accordingly by acts of Congress.

Now, it is just as necessary for Congress to *apportion* to them their respective jurisdictions and powers, and regulate the mode of executing them as to apportion judicial power to the courts.

This has been the opinion of every Congress, as the acts of Congress relative to the departments prove, and no statesman or jurist has ever controverted it.

By the treaty with England of November 18, 1794, (8 Stat., 129, art. XXVII,) it was agreed that on requisition persons charged with murder, &c., should be delivered up to justice.

In the debate in Congress in 1800, on the Robbins case, Mr. Marshall took very high ground in favor of executive power to execute treaty stipulations.

But, referring to the extradition treaty, he said:

"And although the Executive cannot supply a *total legislative* omission, yet it is not admitted or believed that there is such a total omission in this case. * * Congress unquestionably may prescribe the mode, and Congress *may devolve on others* the whole execution of the contract, &c. * * He [the President] has said that *some legislative provision is requisite* to carry the stipulations of the convention into full effect."

And this was evidently the opinion of Madison.

Mr. Madison, in Helvidius, No. 3, discussed the neutrality proclamation of President Washington, and in doing so considered this proposition:

"It is the right and duty of the Executive to judge of and interpret those articles of our treaties which give to France particular privileges, *in order to the enforcement of those privileges.*"

He denies this, and says:

"The right in question is not essential to the execution of the treaty or any other law; on the contrary, the article to which the right is applied cannot, as has been shown, from the very nature of it, *be in operation as a law, without a previous declaration of the legislature;* and all the laws to be *enforced* by the Executive remain in the meantime precisely the same, whatever be the disposition or judgment of the Executive. This second right would also interfere with a right *acknowledged to be in the legislative department.*" (1 Writings of Madison, 630.)

And now we are prepared to see the purpose of that clause of the Constitution which declares that—

"This Constitution, the laws, and treaties shall be the supreme law of the land, *and the judges in every State shall be bound thereby.*"

Why were these words put in the Constitution? I submit the answer from the Report of the Committee on Foreign Affairs in the House of Representatives, (Rep. 37, 2d Sess. 40th Cong., May 18, 1868,) which says:

"The Articles of Confederation vested the treaty-making power in the Congress, with the assent of nine States represented in Congress. But the States claimed and exercised the right to interpret and obstruct the execution of treaties made by the Congress of the confederation with foreign governments. The execution of the treaty of peace of 1783, between Great Britain and the United States, was defeated by the exercise of such powers, and Great Britain refused to deliver up the military possession of the northern and western frontier; asserting, as a reason, that the States refused to repeal their laws prohibiting the collection of British debts. Many of the State laws were conceded to be in violation of the treaty. Congress, four years after the treaty of peace with Great Britain, unanimously declared that, a treaty once concluded by Congress, according to the forms of the Constitution, the legislatures of the several States had no right to pass any act explaining or interpreting its meaning, or limiting, restricting, or counteracting its operation; that all such acts ought to be repealed, leaving Congress to determine what laws were in conflict with the treaty. But the declaration of Congress was ineffectual. It had no power to control the legislation of States, or annul their laws. The States obstructed in the same manner the execution of treaties with France and Holland." (See 3 Jeff. Works, 402, note 2.)

The *State courts* enforced the *State laws* against the provisions of the treaty of peace. The treaty covered only *international* subjects, and yet the State courts disregarded its

provisions. This clause was inserted, then, without any reference to *executive power*.

Treaties are *laws* only to the *courts*. They devolve no duty on executive officers.

The Attorney General, November 20, 1821, said:

"The people seem to have contemplated the National Government as the sole organ of intercourse with foreign nations. It *ought* to be armed with power to satisfy * * the fulfilment of all moral obligations, perfect and imperfect, which the law of nations devolves upon us as a nation. *In this respect our system appears to be crippled and imperfect.*" (1 Opinions, 392.)

The act of February 3, 1831, (4 Stat., 436,) limited the right of property in works of art, literature, and science to "citizens of the United States." Attorney General Cushing (6 Opinions, 291) considered the question how far this act would be controlled by a treaty with Great Britain, signed February 17, 1853, which proposed to give the same rights to British subjects. He held that the treaty ought to be a *law* to the *courts*, but said:

"A treaty, it is true, though it be as such a portion of the supreme law of the land, yet may require the enactment of a statute to regulate the details of a process, or of a right embraced in its stipulations; but such necessity, if it exists, does not affect (in courts) the question of the legal force of the treaty *per se*."

(See 3 Opinions, 56; 9 *Ib.*, 25; 10 *Ib.*, 508; 11 *Ib.*, 145; House Rep. 41, 3d Sess. 41st Cong., Feb. 27, 1871; House Rep. 30, 3d Sess. 41st Cong., Feb. 20, 1871; Senate Rep. 268, 3d Sess. 41st Cong., Dec. 14, 1870.)

By the Constitution all *executive* powers and duties, (except those specifically enumerated and delegated to the President,) including the power to execute laws, are *to be* thereafter "*vested.*" This can only be done by act of Congress. For it is not provided for the Executive, as it is for the court, that *his* power by *virtue of the Constitution* extends to—

"Cases in law and equity arising under treaties."

Whenever the Constitution designated a power to be executed under a treaty, it has said so. It has so provided as to courts; it has *not* so provided as to executive power.

And a treaty can confer no power on courts, except as it is conferred by the Constitution, and in like manner it can confer none on the President. When the Constitution declared treaties supreme laws, it was not supposed that *this declaration*

was obligatory on the *State* courts, and to make it so, it is expressly declared the judges of the State courts shall be bound thereby. When the Constitution declared treaties supreme laws, it was not supposed *this declaration regulated* any duty of the national courts, and accordingly the judicial power was elsewhere extended to treaties. But the Constitution nowhere makes it an executive duty to execute treaties. In this respect our Constitution follows the analogy of the British constitution, under which the king can not execute a treaty without an act of Parliament. Nor is it changed here by the fact that treaties are supreme laws. For it is proved by the debate on Jay's treaty, that in England, too—

"Treaties made by the King are the supreme law of the land"—

—supreme *to the courts*, so far as individual rights become thereby vested.

No change has been made in that respect here, for State courts must give effect to treaties, and the national courts must decide on the rights of parties litigant, so far as law and equity cases are concerned.

But these views may be rendered still more clear. Let us bear in mind that judicial power is conferred in these words:

"The judicial power shall be vested in one Supreme Court and in such inferior courts as Congress may establish.

"The judicial power shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and *treaties*, &c.

"In all cases affecting ambassadors, &c., the Supreme Court shall have original jurisdiction."

Now, here are the two classes of jurisdiction: the delegated original jurisdiction of the Supreme Court, which cannot be divested, and that *other* jurisdiction *to be* therefore "*vested*" by act of Congress.

The two classes of executive jurisdiction are conferred in substantially the same words:

"The executive power *shall be vested* in a President.

"The President shall be commander-in-chief of the army. * * He shall have power to grant pardons. He shall have power, * * with the consent of the Senate, to make treaties, * * to appoint public ministers, &c. He shall take care that the laws be faithfully executed."

These are to be construed like the judicial power. The Executive has some original powers or jurisdiction which can

not be divested. All other executive power must be expressly conferred by act of Congress must be "*vested.*"

Under the Articles of Confederation there was no power to execute treaties by act of Congress as against the will of the States.

This was an evil depicted by Hamilton in No. 22 of the Federalist, in which he says:

"The treaties of the United States, under the present Constitution, [Articles of Confederation,] are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of the legislatures. The faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed."

For the purpose of declaring the supremacy of treaties and acts of Congress *over State authority*, it was declared in the Constitution that *they* should be "the *supreme* law of the land."

But this had no purpose, by calling treaties "laws," to give them any higher or different effect than they had in England, where acts of Parliament were always *supreme* over treaties. This is proved by what Hamilton further said, that "a treaty is only another name for bargain," and that the "Constitution, therefore, has not in the least extended the obligation of treaties." (Fed., No. 52; and see speech of Mr. Nicholas in the House of Reps., March, 1796, 1 Benton Abr., 543.)

This term "law," as applied to treaties, gave rise to discussion in the States ratifying the Constitution, but it was clearly understood that it added no new character to treaties and gave them no supremacy over acts of Congress. In England an act of Parliament was supreme over a treaty on *any subject.* Here an act of Congress in execution of a legislative power is supreme over a treaty *quo ad hoc.* In the Virginia Convention, June 1788, Mr. Nicholas said:

"The provision of the sixth article is, that this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all the treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land. They can *make no treaty* which shall be repugnant to the spirit of the Constitution or *inconsistent with the delegated powers.* The treaties they make must be under the authority of the United States to be within their province. It is sufficiently secured, because it only declares that, in pursuance of the powers given, they shall be the supreme law of the land; *notwithstanding anything in the constitution or laws of any particular State.*"

Mr. Madison said:

"I think the argument of the gentlemen who restrained the supremacy of these [treaties] to the laws of the particular States, and *not to Congress*, is rational. Here the supremacy of a treaty is contrasted with the supremacy of the laws of the States." (3 Elliot, 496-516)

Mr. Corbin said:

"It is clear * * * that the treaties made are to be binding on the States only."

In the great debate of 1796 Mr. Gallatin said:

"It was always considered as discretionary with Parliament to grant money to carry treaties into effect or not, *and to repeal or not to repeal laws that interfere with them.*

"He argued from instances of this doctrine, which he cited from English history, that the treaty-making power here had a constitutional limit, which was only a customary one there." (1 Benton's Abr., 644, 645, 646.)

Mr. Madison said:

"The term supreme, as applied to treaties, evidently meant a *supremacy over* the State constitutions and laws, and *not the* Constitution and *laws of the United States.*"

And another member proved this by quoting the provision that—

"The judges in every State shall be bound thereby," &c.

It was so held by Jefferson. (3 Jeff. Works, 402.)

In the debate of 1816 it was conceded and not controverted that the supremacy of treaties, mentioned in the Constitution, was over *State* constitutions and laws. (Annals, January 17, p. 49.)

Hamilton, who of all other men claimed in his day most for the treaty power, conceded it could "not transfer the legislative power [as the power to sell lands] to the Executive." In commenting on the treaty with England of 1794, he said:

"The only constitutional exception to the power of making treaties is, that it shall not change the Constitution, which results from this fundamental maxim, that a delegated authority cannot alter the constituting act, unless so explicitly authorized by the constituting power. An agent cannot new-model his own commission. A treaty, for example, *cannot transfer the legislative power to the executive department*, nor the power of the last department to the judiciary; in other words, it cannot stipulate that the President, and not Congress, shall make laws for the United States; that the judges, and not the President, shall command the national forces."

He then makes another exception, and proceeds to affirm the supremacy of all legislative powers *infraterritorially*. He says:

"Though Congress is authorized to establish a uniform rule of naturaliza-

tion, yet this contemplates only the ordinary cases of *internal administration*. In particular and extraordinary cases, those in which the *pretensions of a foreign government are to be managed*, a treaty may also confer the rights and privileges of citizens. THUS THE ABSOLUTE CESSION AND PLENARY DOMAIN *of a province or district, possessed by our arms in war, may be accepted by the treaty of peace, on the condition that its inhabitants shall, in their persons and property, enjoy the privileges of citizens.*"

This construction of the power of the President is precisely that which prevailed as to executive power in England, from whose constitution ours is so largely taken.

All legislative power is in Congress. Congress has power to provide for the execution of treaties. This power is legislative. The treaty power is not *legislative*. It cannot do what legislation alone can do—make laws for executive officers.

The Constitution did confer judicial power on the courts that it may be exercised.

It did not confer executive power to execute treaties, because in England and here it never was designed that treaties, as such, should be executed, except in pursuance of legislative act. The recent introduction of a different practice is an innovation—a "novel doctrine" never heard of till after the Constitution had gone into operation.

It has been determined by the weight of authority that the President or other executive officer cannot perform any duty under a treaty, unless in pursuance of an act of Congress to execute it.

It has been so held under the treaties stipulating for the appropriation of money, for the extradition of criminals, reciprocal trade or commercial regulations, the acquisition of territory, regulating postage with foreign nations, &c., &c.

It has been so held as to the issuing of land patents under Indian treaties, and the trial of offences against Indians provided for in treaties.

And an examination of *these subjects*, will sustain the general principles I have stated.

TREATY APPROPRIATIONS OF MONEY.

If a treaty can *ex proprio vigore* appropriate money so as to authorize the officers of the Treasury to pay it, then duties may be imposed to be executed without an act of Congress.

If this could be so, it would afford some evidence that the Cherokee treaty could authorize the Secretary of the Interior to perform the duties preliminary to the issue of patents, but it would not relieve it of the difficulty that it does not purport to confer any power on any officer to issue patents, nor designate any one to perform that duty. If a treaty cannot appropriate money, then the Cherokee treaty cannot authorize the acts necessary to give James F. Joy a title to land.

A treaty cannot authorize the Treasury officers to pay out money.

Upon this subject I present first judicial authority.

In *Turner* v. *Am. Bap. M. U.*, 5 McLean, 344, Judge McLean says:

"A treaty under the federal Constitution is declared to be the supreme law of the land. This unquestionably applies to all treaties, where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and cannot be the supreme law of the land, where the concurrence of Congress is necessary to give it effect. Until the power is exercised, as when the appropriation of money is required, the treaty is not perfect. It is not operative in the sense of the Constitution, as money cannot be appropriated by the treaty-making power. This results from the limitations of our Government. *The action of no department of our Government* can be regarded as a *law* until it shall have all the sanctions *required by the Constitution to make it such.* As well might it be contended that an ordinary act of Congress, without the signature of the President, was a law; or that a treaty which engages to pay a sum of money is in itself a law. And in such a case the representatives of the people and the States exercise their own judgments in granting or withholding the money. They act upon their own responsibitity, and not upon the responsibility of the treaty-making power. It cannot bind or control the legislative action in this respect, and every foreign government may be presumed to know that, so far as the treaty stipulates to pay money, the legislative sanction is required."

And now I invoke upon this question the authority of Congress.

In *Veazie Bank* v. *Fenno*, 8 Wallace, 514, the court say:

"A practical construction of the Constitution by Congress is entitled to great consideration, and should be followed in all cases of doubt."

I think I am safe in saying no money has ever been paid out of the Treasury by the authority of a treaty merely. Here, then, is high evidence of a universal belief that the Constitution requires an act of Congress to appropriate money.

This subject and the extent of the treaty-making power were discussed in Congress in March, 1796, in the debate on Jay's treaty.

In that debate Mr. Nicholas referred to the clause of the Constitution making treaties the supreme law, and said:

"It is obvious that the supremacy of the law is over the Constitution and laws of the separate States, which was necessary to prevent these interfering with those. But it does not affect the power of the House as a component part of the general legislature and authority of the United States."

And Mr. Gallatin said:

"Unless it is allowed that either the power of the House over the purse-strings is a check, or the existing laws cannot be repealed by a treaty, or that the *special powers granted to Congress limit the general power of treaty-making*, there are no bounds to it; it must absorb all others, repeal all laws in contravention to it, and act without control."

And the distinction between subjects of *treaty jurisdiction* and legislative jurisdiction was so forcibly stated, the line which separates *international* subjects and *infraterritorial* legislative subjects so faithfully drawn, by Mr. Harper that I quote his language for its unanswerable positions.

He said:

"In order to discover how far these powers could resist each other, it was necessary to inquire how far they might interfere; and that inquiry would lead us to consider the nature of treaties and the nature of laws, the origin from which each is derived, the objects on which they act, the manner of their operation, the purposes for which they are intended, and the effects which they are able to produce. * * * * * *

"Treaties derive their origin and their existence from the consent of equals; laws from the authority of a superior. * * * *

"A treaty stipulates that a thing shall be done; a law commands it. A treaty of consequence may stipulate that a law shall be passed, but it cannot pass a law; that belongs to the legislative power.

"A treaty may agree that a tax shall be laid or a crime shall be punished, but it cannot lay the tax or inflict the punishment; that must be done by law, and is the *exclusive* province of the legislative power. Suppose a treaty should stipulate that ten per cent. additional duty should be laid on goods imported in Swedish vessels; will any one say that the revenue officers could go on and collect the duty without a law? Surely not. The faith of the nation is bound, and the legislature is under all that obligation to pass the law which results from considerations of good faith from the necessity of observing treaties; but still the effect cannot be produced, the duty cannot be collected, till the law is passed. * * * * * *

"A distinction here ought to be observed between the *law of nations* and the *municipal law*. The former is the province of *treaties*; the latter of the *legislative* power. The law of nations is made of compacts expressed or implied; of treaties, which are direct declarations of the consent of sovereign states and of customs which rest on the general consent of nations, implied from long acquiescence.

"In all subjects, then, relative to the law of nations, to matters *external* to the conduct of nations towards each other, treaties are laws, and produce immediately and indirectly the effect of laws. As such, the maritime courts, which are guided by the law of nations, are bound to take notice of them and enforce them. This was from the necessity of the case, because the matters on which the law of nations operates *lie beyond the reach of ordinary legislation without the jurisdiction of individual States*, and consequently can only be regulated by laws

derived from the general consent of nations, of which treaties form a part. But *as to the municipal laws* the case was different. *They affected objects within the jurisdiction* of the respective sovereigns, and belonged *exclusively to the legislative power.*

"These treaties lost their character of laws and became merely compacts, binding on the good faith of the nation, but *depending for their executeon on the acts of the legislative authority.*

"Thus it appeared that the treaty-making and legislative powers, being *each supreme in their respective orbits*, could *not interfere with or restrict each other.* Both compacts and laws are necessary to be made; both are essential to the attainment of those advantages which result from civilized society; and the power of making each must exist in every government. In ours, these powers are placed in different departments, which must, sometimes, co-operate, in order to produce the desired effects, *but neither could execute the business of the other.* The legislature could not make a compact, nor could the treaty-making power make a law. It may stipulate and very often must stipulate that a thing requiring a law must be done, but this does not render the law less necessary, and can be no more considered as an invasion of the legislative power than a law directing a compact to be made with a foreign nation as an invasion of the treaty-making power. The law would not produce the effect of a treaty, nor render the agency of the treaty-making power less necessary." (Annals of Congress, 748.)

Very much of the discussion turned on the question whether a treaty imposed on Congress, a *duty* to enact laws to execute it, or whether Congress had a right to *judge of the expediency* of enacting the laws. All this conceded that if Congress did not, in fact, enact the laws, that the treaty could impose no duty on the officers of the Government.

The result was, that the laws required to execute the treaty were passed; which is an evidence that the treaty could not be executed without them. (See 9 Jeff. Works, 106, 109, 190; 3 Ham. Hist. Repub., 21.)

But the House of Representatives, to preclude all doubt, by a vote of 57 to 35, on the 7th day of April, 1796, resolved—

"That it being declared by the second section of the second article of the Constitution that the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur, the House of Representative does not claim any agency in making treaties; but that when a treaty stipulates regulations on any subjects submitted by the Constitution to the power of Congress, it must depend for its execution as to such stipulations on a law or laws to be passed by Congress, and it is the constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or inexpediency of carrying such treaty into effect, and to determine and act thereon as in its judgment may be most conducive to the public good."

The House again, at the first session of the present Congress, unanimously adopted the same resolution, probably having reference to the pending treaty for the annexation of San Domingo.

The same questions were discussed in relation to appropriations to pay Russia according to the stipulations of the Alaska treaty (Globe, 2d Sess. 40th Cong., Appx., 379, 394; House Rep. 37, 2d Sess. 40th Cong., May 18, 1868, Ex. Doc. 177, 40th Cong., 2d Sess.) The result was, that Congress passed the act of July 27, 1858, (15 Stat., 198,) which affirms that money cannot be paid from the Treasury, nor the cession of Alaska accepted, "except by legislation." The act is as follows:

"Whereas the President of the United States, on the thirtieth of March, eighteen hundred and sixty-seven, entered into a treaty with the Emperor of Russia, and the Senate thereafter gave its advice and consent to said treaty, by the terms of which it was stipulated that, in consideration of the cession by the Emperor of Russia to the United States of certain territories therein described, the United States should pay to the Emperor of Russia the sum of seven million two hundred thousand dollars in coin; and whereas it was further stipulated in said treaty that the United States shall accept of such cession, and that certain inhabitants of said territory shall be admitted to the enjoyment of all the rights and immunities of citizens of the United States; and whereas said stipulations cannot be carried into full force and effect except by legislation, to which the consent of both Houses of Congress is necessary; therefore

"*Be it enacted, &c.*, That there be, and hereby is, appropriated from any money in the Treasury, not otherwise appropriated, seven million and two hundred thousand dollars in coin, to fulfill stipulations contained in the sixth article of the treaty with Russia, concluded at Washington on the thirtieth day of March, eighteen hundred and sixty-seven."

Jefferson, in his letter to Giles, December 31, 1795, said:

"When a treaty is made involving matters confided by the Constitution to the three branches of the legislature, conjointly, the Representatives are free * * to consider whether the national interest requires or forbids their giving the forms and force of law to the articles over which they have a power." (4 Jeff. Works, 125.)

"Whenever *they include in a treaty* matters *confided by the Constitution to the three branches of the legislature, an act of legislation will be requisite to confirm these articles.* * * On the precedent now to be set will depend the future construction of our Constitution, *and whether the powers of legislation shall be transferred* from the President, Senate, and House of Representatives to the President and Senate and Piamingo or any other Indian Algerine or other chief." (Jeff. to Monroe, March 21, 1796, 4 Jeff. Works, 135.)

Some commentators, like Kent, (1 Kent, 286,) have criticized the action of the House in passing the resolution of April 7, 1796, but only on the ground that a treaty is "obligatory on Congress," imposing a duty to enact laws necessary to execute it. And Kent does not assume that a treaty can be executed without an act of Congress. (As to the *duty* to pass acts, see 5 McLean, 344; Annals Cong. 1st Sess., 14th

Cong., 484, 491, 538, 527; 7 Hamilton's Works, 556, 566; 6 Ham. Hist. Repub., 360.)

I now proceed to consider commercial treaties, which I regard as very important, because, if these cannot repeal existing tariff laws, nor become laws to executive officers, an Indian treaty providing for a sale of the public lands cannot repeal existing acts on that subject, nor be a law to executive officers to carry out its provisions.

COMMERCIAL TREATIES.

As to commercial treaties, Jefferson, referring to the power of the Creek treaty of August 7, 1790, to repeal tariff duties, said:

"No thought of General Washington ever countenanced a change of our Constitution so vital as would be the * * [treaty] * * power of depriving us of our laws." (6 Jeff. Works, 558; Gen. Banks's Report, No. 37, 2d Sess. 40th Congress, May 18, 1868; 1 Jeff. Works, 349; 5 Marshall's Washington, 233.)

The commercial convention of July 3, 1815, with Great Britain, was discussed in the Congress of 1815–'16. The discussion proves *that, inasmuch as Congress has power to "regulate commerce with foreign nations," a treaty regulating reciprocal trade, and prescribing rates of duties, cannot repeal existing customs duties, and consequently cannot be a "law" to the executive officers of the Government.*

President Madison so understood it.

On the 26th December, 1816, he sent his proclamation to Congress, notifying the treaty, and in his message he said:

"I recommend to Congress such legislative provisions as the convention may call for on the part of the United States."

The debates prove that it had always been the practice of the Government to execute all such treaties by legislation.

On the 8th January, 1816, Mr. Forsyth, referring to the discussion on Jay's treaty in 1795, and the principle then decided, said:

"The principle established was 'that, when a treaty stipulates regulations on *any* of the *subjects submitted by the Constitution to the power of Congress*, it must depend for its execution as to such stipulations *on a law or laws to be passed by Congress.*'

"The recollection of the gentleman (Gaston) was, therefore, not faithful when he supposed the doctrine of that day confined the power of Congress in

the execution of treaties to cases of *appropriation* only. The rule was *general* and applied to *all cases* without distinction, *over which power was specially given by the Constitution to the legislative department.* This general rule since that period has been uniformly and consistently observed.

"In the execution of the British treaty no law was passed at the period of the memorable dispute already alluded to but one appropriating money; but the cause might be discovered by referring to the treaty itself. None of its provisions were inconsistent with the existing laws.

"Subsequently, however, it was found necessary *to provide by law* for the faithful execution of the XIXth article. By this article it was stipulated that, when one party was a belligerent and the other a neutral power, to prevent injury to the property, &c., of the neutral upon the ocean, from the improper conduct of the captains and crews of private armed vessels, the owner and master should give bond and security * * to answer for the injuries which might be sustained by such misconduct. When the *quasi* war was authorized against France, the President was empowered to grant commissions to private armed vessels. The stipulation of the treaty was imbodied in the act of Congress.

"The same provision was made in nearly the same words in the war against Tripoli.

"The conduct of the Government had been regulated by the same rule in their legislative acts to carry into effect the treaty with Spain. * * The Xth article intended to provide for the case of vessels of either nation forced by distress into the ports of the other * * should, if landed, be reloaded and carried away without the payment of duty. * * Sometime during or before the year 1804 the Spanish brigantine Nancy came into Norfolk in distress. * * It was deemed necessary to pass an act remitting the duties, and that they should not be payable in similar instances in the future.

"The treaty with France in 1801 had been alluded to. By referring to the appropriation act passed in consequence of the ratification of that treaty, it will be found to contain a declaration of the obligation to return vessels captured during the war, according to the condition of the convention. This was supposed sufficient authority for the delivery of the Berceau by the President.

"The statute-book was full of examples, but none were more decisive than those founded upon the cession of Louisiana to the United States by France in 1803. It was deemed most expedient to pass an act to lay and collect duties * * within said territory. In this act provision was made to secure to French and Spanish ships the commercial advantages which were promised as one of the conditions of the cession.

"But this was not all. In 1800 an act was passed allowing drawback on goods exported from the United States to New Orleans, being a foreign port. Although it might have been considered repealed by the transfer of this port to the United States, it was supposed necessary to repeal the act by an act of Congress passed in 1803.

"Louisiana, too, was admitted into the Union not by treaty stipulation, but by an act of Congress in performance of the obligation imposed by it.

"No difference was made by the Constitution between treaties with foreign powers and with the Indians. The rule had been extended to them. Without examining the particular cases, * * an arrangement had been made with all the Indian tribes with whom we had entered into compacts, that crimes committed by whites upon Indians within the Indian territory should be punished. Prosecutions were commenced not upon the treaty, but upon the law made in consequence of the treaty engagements.

"In Great Britain this very treaty will require an act of Parliament before it can be carried completely into effect. * * This was the ordinary course in that country. (Annals, 1st Sess. 14th Cong., 476, 475, 481, 576, 525, 532.) A commercial treaty was negotiated between France and England after the peace of Utrecht; it was not carried into effect, because the House of Commons rejected the bill to alter the commercial and revenue laws according to the compact.

"In 1786 a treaty of commerce between those nations was carried into effect by an act of Parliament passed according to its stipulations.

"The order in council of the 17th of August, 1815, was founded upon an act of Parliament, passed for the purpose of enabling the Prince Regent to conform the existing regulations of commerce to the treaty which might be made." (Annals, 1st Sess. 14th Cong., 473.)

Mr. Gholson showed the great danger of admitting a treaty power to regulate duties, for, said he:

"If it be admitted that the treaty-making power can repeal a tax, it will scarcely be denied that the same power can, in like manner, impose a tax." (Annals, 1st Sess. 14th Cong., p. 523.)

Mr. King insisted that the construction of the Constitution, which required legislation to execute a commercial treaty—

"Is strengthened by a part of the general power given to Congress following the enumerated powers 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States or of any other department or officer thereof.' In other words, for carrying into execution the treaty-making power (that being among the other powers) in all cases where it has been exercised on subjects placed by the Constitution within the control of the legislative department. (Annals, 1st Sess. 14th Cong., 539.)

"Further, your Government has well understood this distinction. Some treaties they, by their *proclamations, merely ratify and confirm, where legislative aid is necessary, as in the present case;* others, they not only ratify and confirm, but *enjoin an observance thereof upon all our citizens,* as will be seen by turning to the ratification, by Mr. Jefferson, of several treaties published in the seventh volume U. S. Laws." (Annals, 1st Sess. 14th Cong., 539.)

Mr. Barbour said:

"Whenever a treaty operates upon a subject which * * is amongst the enumerated powers of legislation delegated by the Constitution to Congress, * * the co-operation of Congress is necessary to give effect to such treaty by the passage of a law.

"The arguments of its opposers amounts to this: the Constitution gives * * the right of making treaties, * * and it declares they shall be the supreme law; * * and what is already the supreme law can derive no additional validity from any other law.

"But in what does this supremacy consist? Is it in a superiority over the Constitution and laws of the United States? The Constitution itself answers to this question, that it is not, for * * the same clause which declares treaties the supreme law *associates with them the Constitution and laws of the United States;* it throws the three *into one class,* and declares that the whole class, to wit, the Constitution, the laws of the United States, and treaties, shall be the supreme law. Supreme over what? The next paragraph answers by declaring that the judges of every State shall be bound thereby, anything in the Constitution or law of any State to the contrary notwithstanding. It is obvious that *the supremacy* is a term of relation to the States; the United States and its Constitution, laws, and treaties are put in competition with the States and their constitutions and laws; and as it respects the latter, the former are declared to be supreme; but there is *no graduation of superiority* between the Constitution, laws, and treaties * * as amongst themselves." (Annals, 1st Sess. 14th Cong., 478, 479. See pp. 484, 525.)

Mr. Barbour said:

"But gentlemen contend that the power of making treaties is given in *gen-*

eral terms. There is *no exception of the subject-matter* of this treaty; therefore it is included.

"If there were no other part of the Constitution which had a bearing upon this question, there would be more validity in the argument; but there are other important provisions which have direct relation to the question; and it is indispensable to a just construction * * *that they be taken together.* This is the universal rule for the construction of all instruments.

"The grant of legislative power, *quo ad* the subject granted, must operate some limitation, or otherwise the partition between the different branches of the Government will be broken down, the whole character of the Government will be essentially changed, and the treaty making power, like Aaron's serpent, will swallow up the rest.

"Can this construction be correct? If it be, it must be upon the principle that one part of the Constitution alone is to be consulted, whilst other parts are to be disregarded; for take them together, and, if there be any meaning in words, it is that as to commerce *Congress shall have power to regulate it, which cannot be,* if another branch of Government have power to change that regulation without consulting or needing the co-operation of that body. * *

"No gentleman has met this part of the argument by affirming that the nation can be involved in war by treaty.

"Although the grant of the treaty-making power is in words not limited in themselves, yet a just construction of the Constitution affixes to it these two kinds of limitation: First, that nothing can be done by treaty which the Constitution declares shall not be done; secondly, that whenever the subject of a treaty is one of the powers delegated to Congress, that then the co-operation of Congress is necessary." (Annals, 1st Sess. 14th Cong., 478.)

Mr. Calhoun argued that the treaty was operative as a law. But he did *not* claim that the treaty power could act on a subject-matter *delegated to Congress.* He attempted to distinguish between the *jurisdiction* of the treaty and legislative powers, and to place a commercial treaty under the treaty jurisdiction by reason of the mode of securing the object. He said:

"The treaty-making power, when it was legitimately exercised, *always* did that *which could not be done by law.* * * Can Congress do what this treaty has done? It has repealed the discriminating duties between this country and England. Either could by law repeal its own. But by law they could go no further, and for the same reason that peace cannot be made by law. Whenever, then, an ordinary subject of legislation can only be regulated by contract, it passes from the sphere of the ordinary power of making laws, and attaches itself to that of making treaties. All acknowledge the truth of this, *when the subject on which the treaty operates is not expressly given to Congress* But in other cases they consider the two powers as concurrent; and conclude, from the nature of such powers, that such treaties must be confirmed by law. * * The truth is, the legislative and treaty-making power are never in the strict sense concurrent. They both may have the same subject, as in this case of commerce, but they discharge functions as different in relation to it in their nature as their subject is unlike. When we speak of concurrent powers, we mean when both can do the same thing; but when the two powers under discussion were confined to their proper sphere, not only the law could not do what could be done by treaty, but the reverse was true; that is, they never are nor can be concurrent powers." (Annals, 1st Sess. 14th Cong., 529; See Gen. Banks's House Com. Rep., No. 37, 2d Sess. 40th Cong., p. 2.)

But, under Calhoun's rule, the whole legislative power may be surrendered by treaty.

A foreign nation might cede us territory in consideration of a surrender of the power to coin money. Here a treaty would, *if valid*, accomplish what an act of Congress could not.

A foreign power might grant permanent commercial advantages for a treaty repeal of the Department of State, created as it is by act of Congress.

There must be a limit to the treaty power to repeal existing laws or create a new law by treaty. The only safe rule is, to say the treaty power is supreme over *State laws*, on every subject of international law, international disputes, the rights of foreigners, but never so as to annul an act of Congress passed in pursuance of a delegated power.

But even within the rule stated by Calhoun, an Indian treaty cannot dispose of the public lands, because the Indian tribes and the lands are alike constitutionally subject to the legislative power, while foreign nations are not.

And a law *can* secure *all* that can be secured by treaty. It can authorize contracts. Our foreign mail arrangements are made by postal conventions authorized by act of Congress.

Mr. Gholson in the debate of 1861 read—

"If the affairs of revenue from imports and of commerce can be finally and conclusively arranged by the treaty-making authority, without the aid of legislation, it is perfectly obvious that the grants of [legislative] power can be nullified at the mere pleasure of the President and Senate; that powers which are bestowed on them and this House conjointly can be exercised by them exclusively" (Annals, 1st Sess. 14th Cong, 522.)

Mr. Barbor replied to the argument, that a treaty could regulate legislative subjects, because a treaty could make peace, by repealing an act declaring war. He said:

"The Constitution gives to Congress the power to declare war, but it does not give them the power to make peace; it would have been idle to have given such power. * * Let us see what would be the language of a law enacting peace: Be it enacted, &c., that there shall be peace between the United States and Great Britain. But the enemy does not choose to be at peace; the war would continue." (Annals, 1st Sess. 14th Cong., 482; see 490, 527, 528.)

Mr. Gholson further said:

"After conceding to this House the privileges for which it contends and which are evidently guaranteed to it by the Constitution, (delegated legislative powers,) there would still be left to the treaty-making authority a wide range of powers. For instance, the entire subject of belligerent regulations, including the most important topic of impressment, the question of search, the subject of boundaries, and many others."

The result was, that a declaratory act was passed March 1, 1816, (3 Stat., 255,) as follows:

"That so much of any act as imposes a higher duty of tonnage or of import on vessels and articles imported in vessels of Great Britain than on vessels and articles imported in vessels of the United States, contrary to the provisions of the convention, between the United States and His Britannic Majesty, the ratifications whereof were mutually exchanged the twenty-second day of December, one thousand eight hundred and fifteen, be from and after the date of the ratification of the said convention and during the continuance thereof, deemed and taken to be of no force or effect."

The position assumed by Mr. Calhoun was not sustained by Congress.

It should be remarked, too, that the treaty of 1815, (8 Stat., 228,) was in a *form* to be operative as a law. It did not *stipulate for legislation.* Its language is:

"No higher or other duties shall be imposed on the importation into the United States of any articles the growth, produce, or manufacture of His Britannic Majesty's territories in Europe, and no higher or other duties shall be imposed on the importations into the territories of His Britannic Majesty in Europe of any articles the growth, produce, or manufacture of the United States, than are or shall be payable on the like articles being the growth, produce, or manufacture of any other foreign country; nor shall any higher or other duties or charges be imposed in either of the two countries on the exportation of any articles to the United States or to His Britanic Majesty's territories in Europe, respectively, than such as are payable on the exportation of the like articles to any other foreign country."

The VIIth article of the treaty with France of July 4, 1831, stipulated for rates of duties on wines imported into the United States less than by existing acts of Congress. (8 Stat., 432; act May 24, 1828, 4. Stat., 309.) The act of July 14, 1832, remodeled the tariff act of 1828 to conform to the treaty. (4 Stat., 589. See 6 Opinions, 295.)

The necessity for such legislation has always since been conceded. The act of May 19, 1828, (4 Stat., 276,) provides:

"If any one, being a citizen of the United States, or trading under their authority, shall, in contravention of the stipulations entered into by the United States with the Emperor of all the Russias, by the fifth article of the treaty signed at St. Petersburg on the 17th day of April, A. D. 1824, sell or cause to be sold to the nations of the country on the northwest coast of America, or any of the islands adjacent thereto, any spirituous liquors, firearms or other arms, powder, or munitions of war of any kind, the person so offending shall be fined in a sum not less than fifty nor more than two hundred dollars, or imprisened not less than thirty days nor more than six months."

The act of August 5, 1854, (10 Stat., 587,) provides:

"That whenever the President of the United States shall receive satisfactory evidence that the imperial Parliament of Great Britain and the provincial Parliaments of Canada, New Brunswick, Nova Scotia, and Prince Edward's Island have passed laws on their part to give full effect to the provisions of the treaty between the United States and Great Britain, signed on the 5th of June

such evidence, and thereupon, from the date of such proclamation, the following articles, being the growth and produce of said provinces of Canada, New Brunswick, Nova Scotia, and Prince Edward's Island, to wit: * * * *

"Shall be introduced into the United States free of duty so long as the said treaty shall remain in force, subject, however, to be suspended in relation to last, he is hereby authorized to issue his proclamation, declaring that he has the trade with Canada on the condition mentioned in the fourth article of the said treaty. And all the other provisions of the said treaty shall go in effect and be observed on the part of the United States."

All this is made the more conclusive by reference to the practice of England on this subject, and the history of our own Constitution. It is clear that a commercial treaty never was in England a *law* to executive officers, but that an act of Parliament has always been deemed necessary to execute it.

Still more, our own history proves that our Constitution was adopted with a view to give treaties only the same effect as to executive officers here as in England.

THE PRACTICE IN ENGLAND.

In Lawrence's Wheaton it is said, (p. 457:)

"Commercial treaties which have the effect of altering the existing laws of trade and navigation of the contracting parties may require the sanction of the legislative power in each State for their execution. Thus the commercial treaty of Utrecht, between France and Great Britian, by which the trade between the two countries was to be placed on the footing of reciprocity, was never carried into effect, the British Parliament having rejected the bill, which was brought in for the purpose of modifying the existing laws of trade and navigation, so as to adapt them to the stipulations of the treaty."

The act of 37 George III, c. 97, was passed—

"For carrying into execution the treaty of amity, commerce, and navigation, concluded between His Majesty and the United States of America,"

being the treaty of November 17, 1794.

And in England it has been deemed proper, by act of Parliament to make the treaty a law to the courts. This treaty and act in effect determined that—

"American citizens who held lands in Great Britain on the 28th October, 1795, are to be considered, as regards these lands, not as aliens, but as native subjects."

(1 Russell & Mylne, R. 663; 2 Phillimore, 522; see *Maltas* v. *Maltas*, Robertson's Eccl. R., 70; act Parliament 28th June, 1815, and 3d August, 1832, to execute treaties; 2 Phillemore International Law, 537–539.)

THE OBJECT OF OUR CONSTITUTION.

In the convention which framed the Constitution, August 23, 1787, Mr. Wilson, discussing the treaty power, &c., said:

"In the most important treaties the King of Great Britain, being obliged to resort to Parliament for the execution of them, is under the same fetters," &c.

On the 15th of August Mr. Mercer said:

"Treaties would not be final, so as to alter the laws of the land, till ratified by legislative authority. This was the case of treaties in Great Britain, particularly the late treaty of commerce with France"

In No. 64 of the Federalist Hamilton says:

"A treaty is only another name for a bargain. * * The proposed Constitution, therefore, has not in the least extended the obligation of treaties."

In the Virginia convention, June 18, 1788, Mr. Corbin proved the same position, and he referred to—

"The last clause of the treaty with France, which gives certain commercial privileges to the subjects of France, to give full effect to which certain corresponding alterations were necessary in the commercial regulations."

Whenever it has been claimed that a commercial treaty could become a supreme law *per se*, it has been *solely* on the ground that the subject-matter was *international* and *extra-territorial*, and with an admission that the treaty power did not reach *infraterritorial* legislative subjects. (Annals Cong., Jan., 1816, p. 49.)

In 1 Tucker's Blackstone, Appx., 339, it is said:

"What, then, is the effect of a treaty made by the President and Senate, some of the articles of which may contain stipulations *on legislative objects*, or such as are expressly vested in Congress by the Constitution, until Congress shall make a law carrying them into effect? * * The answer seems to be that it is, in some respects, an inchoate act. It is the law of the land, and binding upon the nation in all its parts, except so far as relates to these stipulations. * *

"The whole, except those stipulations embracing *legislative objects*, might remain a treaty. * * (Debate on the treaty-making power, p. 346; resolution of the House of Representatives, April 6, 1796.) * * A contrary construction would render the power of the President and Senate paramount to that of the whole Congress, even upon those subjects upon which every branch of Congress is by the Constitution required to deliberate. * *

"Let it be supposed, for example, that the President and Senate should stipulate by treaty with any foreign nation; that, in case of war between that nation and any other, the United States should immediately declare war against that nation: can it be supposed that such a treaty would be so far the law of the land as to take from the House of Representatives their constitutional right to deliberate on the expediency or inexpediency of such a declaration of war, and to determine and act thereon according to their own judgment?"

(And see 1 Benton's Abridgment, 671, 702; Benton's Thirty Years' View as to Cherokee Treaty, p. —; 4 Hamilton's Works, 340; 7 Hamilton's Hist. Repub., 518, 556.)

And, finally, upon this branch of the subject I call attention to the authority of *Taylor* v. *Morton*, 2 Curtis, 454, where it is said, in relation to the treaty with Russia of December 18,

1832, (8 Stat., 444,) that its execution was not for the courts; that "this is a question for Congress, not for the courts."

EXTRADITION TREATIES.

The discussions on commercial treaties have proved that they cannot operate as laws to executive officers, because, first, no treaty can so operate; and, second, none at least which deals with a subject-matter over which power is expressly delegated to Congress.

Treaties, it has been claimed, may be operative *per sese* for many purposes, even without acts of Congress. Alexander Hamilton claimed that treaties for the *cession* or *acquisition* of territories, to determine disputed boundaries, * and giving citizenship to people in a territory annexed by treaty, all being *international* subjects, and requiring no aid to give them present effect, and calling for nothing to be done in future, were all operative as laws. In that view and for these purposes it has been claimed treaties might be laws not only to courts, but as affecting all rights covered by them. But this, if true, does not change the position that treaties are not laws, when they require the performance of executive duties in future, for purposes *infraterritorial.*

In that extreme view put forth by Hamilton, and which is as far as he ever went, it would scarcely be possible for executive officers to execute extradition treaties. If it could be held otherwise—if they could do so—this would leave untouched the position that other treaties affecting *infraterritorial legislative subjects*—as the disposition of the public lands—could not authorize executive officers to execute them.

But if it should be held that extradition treaties cannot be executed by the President without the authority of an act of Congress, it adds strength to the position—indeed it conclusively follows—that executive officers cannot execute treaties for the sale of the public lands.

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* As to effect of international boundary treaties, see
Little v. *Watson*, 32 Maine, 2 Redf., 214.
U. S. v. *Repentigny*, 5 Wallace, 211.
McGee v. *Doe*, 9 Florida, 382.
Seabury v. *Field*, 1 McAll., C. C., Cal., 1.
McGregor v. *Comstock*, 16 Barb., 427.

And it is abundantly proved, by reason and authority, that extradition treaties cannot be executed except in pursuance of an act of Congress.

Upon this subject the treaty power here was designed to be as in England.

Phillimore gives a full account of extradition treaties, and, referring to England, says, (1854:)

"At present she has only two treaties of extradition: one with France and another with America, *both confirmed by acts of Parliament.* (Hertslet's Treaties, vol. 6, p. 448.) 'An act of the British Parliament, for giving effect to a convention between Her Majesty and the King of the French, for the apprehension of certain offenders.' (6 and 7 Vic., c. 75, s. 1, August 22, 1843.) Further provisions for facilitating the execution of this act were given by 8 and 9 Vic., c. 120.) The treaty of Great Britain with the United States of 9th August, 1842, * * was confirmed by the act 6 and 7 Vic., c. 76, passed August 22, 1843, and further confirmed by the 8 and 9 Vic., c. 120, which facilitated their execution." (International Law, 427.)

It has been judicially determined in England that an extradition treaty is not a law to executive officers until made so by act of Parliament.

In the *Queen* v. *Clinton*, Baron Platt held, that the act of Parliament to execute the treaty could only apply to those who had committed crime *after the passing of it.* (Phillimore, 431.)

In Canada, the act of May 30, 1849, (12 Vic., c. 19,) as amended May 18, 1861, (14 Vic., c. 6,) provides—

"For the better giving effect, within this province, to a treaty between Her Majesty and the United States of America, for the apprehension of certain offenders."

This subject has undergone judicial examination in the United States.

The case of *Metzger*, in 1 Barbour, 248, is an important one. Metzger was claimed under an extradition treaty, there being no law passed to effectuate the treaty stipulation. Edmonds, J., delivered a long and exhaustive opinion, reviewing the judicial action up to that time. Its purport will be gathered from these points in the syllabus, as follows:

"The President of the United States has no authority, by virtue of a new treaty stipulation, and without an express enactment of the national legislature, to deliver up a resident of this country to a foreign power.

"Upon the principles of the common law a treaty does not execute itself, nor can the courts act under it for the purpose of enforcing its provisions, except in pursuance of a statute.

"The provision in the Constitution of the United States which declares that the Constitution and the laws made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, does not *ex proprio vigore*, and without legislative enactment, confer upon *the officers of the national Government the power of executing the stipulations of a treaty.*

"Where a treaty contains a proviso importing a contract, that its terms shall at some future period be ratified and confirmed, such treaty does not execute itself, but it must be executed by an act of Congress before it can become a rule for the decision of the courts."

In 1799 Jonathan Robbins was surrendered to the British authorities by the district court of the United States for South Carolina, under the XXVIIth article of the treaty of November 19, 1794. The judge ordered him delivered to the British consul, but this was done while "a detachment of national troops was under arms opposite the court-house" ready to aid the extradition, and under the pressure of a letter from the President to the judge, in which he "*advises and requests*" the surrender. The President himself did not venture to make the surrender.

And the speech of Mr. Marshall (afterwards Chief Justice) in Congress, on this subject, in March, 1800, rendered a repetition of that performance by a court impossible. (Wharton St. Tr., 393; *U. S.* v. *Nash*, Bee's Admiralty, p. 266. As to surrender of Kaine, in 1853, to Great Britain, see Phillimore, 430.)

In the case of Metzger, (5 N. Y. Legal Obs., 83; Wharton, St. Tr., 457, note) Judge Betts held, that extradition "is a political question" over which courts had no control.

By the Constitution it is declared, that "this Constitution, and the laws of the United States, and all treaties * * shall be the supreme law," &c.

But the Constitution does not execute itself. It provides that—

"A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to the State having jurisdiction of the crime." (Art. IV, sec. 2.)

As early as 1791 a demand was made under this section by the Governor of Pennsylvania upon the Governor of Virginia. No act of Congress having then been passed to regulate these proceedings, the two governors called the attention of the

President to this subject, and he immediately submitted it to the consideration of Congress. This led to the act of February 12, 1793, (*Br. Digest U. S.*, 293,) which declares that, whenever the executive authority of any State shall demand any person as a fugitive, and shall moreover produce the copy of an indictment found or an affidavit made before a magistrate charging treason, felony, or other crime, it shall be the duty of the executive of the State to which such person shall have fled to cause him to be arrested.

The rendition of fugitive slaves was provided for by acts of Congress.

And to affirm that a treaty can be executed without an act of Congress, while the Constitution cannot, is to declare a treaty higher than the Constitution itself.

In a note to Metzger's case, (1 Barb., 258,) it is said that the extradition law of 1829—

"Is understood to owe its origin to the fact that so distinguished a jurist as Judge Story refused to execute one of these treaties until Congress had legislated on the subject."

(And see act August 12, 1848, 9 Stat., 303; act June 22, 1860, 12 Stat., 84; act March 3, 1869, 15 Stat., 337.

If powers of extradition have been asserted under treaties, it has been on the ground that the subject was purely *interuational*—not a subject delegated to Congress—and as a treaty power *only* capable of execution when the treaty—

"Has prescribed by its own terms the manner, mode, and authority in and by which it shall be executed." (4 Opinions, 209; 1 Woodbury & Minot's R. 66; House Ex. Doc. 25, 3d Sess. 41st Cong.; Akerman, Atty. Gen., Opinion, December 15, 1870.)

But the doctrine, undisputed in England, that extradition treaties can only be executed by act of Parliament, the unmistakable decision of this question by both branches of Congress in repeated laws, ought to be finally decisive of this question.

There are many acts to execute treaties of various kinds.

Act February 28, 1809, Spanish treaty.

Act May 23, 1828, Spanish treaty February 22, 1819; 2 Peters, 315; 6 Peters, 708, 712–714; 9 Peters, 711, 716, 736, 741.

Act May 26, 1830, 7 Peters, 52.

Act March 3, 1851, Mexican treaty.

Act February 20, 1861, New Granada treaty, September 10, 1857.

Act March 3, 1819, 2 Peters, 316.

The treaties by which Louisiana and Florida were acquired were followed by acts of Congress, which gave them sanction; and see act October 31, 1803, and treaty of April 30, 1803.

(See *United States* v. *Ferreira*, 13 Howard, 40; *United States* v. *Todd*, 13 Howard, 52; act July 6, 1842, 1 Lester, 68–97.)

THE EXECUTION OF TREATIES GENERALLY BY ACT OF CONGRESS.

I might cite additional acts of Congress providing for the execution of *international* treaties.

But without *now* inquiring whether *Indian treaties* are of equal dignity with *international* compacts, I may say it has been the universal sense of the nation that *they* could only be executed by officers in pursuance of acts of Congress.

Congress has accordingly legalized, executed, regulated, or abrogated these treaties at discretion. (2 Writings of Madison, 95.)

I will refer to some of these as follows:

1. The Creek treaty, August, 1814, provided that chiefs and warriors of the Creeks should each be entitled to a reservation of land of one mile square each, &c. The act of Congress of 3d March, 1837, (5 Stat. 180,) regards the treaty as inoperative *per se*, and provides:

"That the chiefs and warriors of the Creek nation who, by virtue of the first article of the treaty of the 9th of August, 1814, are entitled to a reservation of land, * * * shall be authorized to locate said reservation in the following manner," &c. (See act February 20, 1819; see Am. St. Papers, Pub. Lands, vol. 4, p. 858; also pages 21–248, of acts to carry treaties into execution. (See act 3d March, 1803, as to Miss. Te. As to Quapaw treaty, Nov. 15, 1824, Pub. Lands, vol. 4, p. 860–877, Am. St. Papers.)

"And see Act July 15, 1838, 5 Stat., 256; and August 23, 1842, 5 Stat., 514; Creek treaty, March 24, 1832.

"The treaty of 1814 gave no fee. (Am. St. Pap., Pub. Lands, vol. 8, p. 581; vol. 6, p. 219.

"As to Creek treaty, February 16, 1815, Pub. Lands, vol. 6, 347; vol. 8, 924.

"See act June 30, 1834, 4 Stat., 721."

2. Act June 30, 1834, 6 Stat., 601; Miami treaty, October 6, 1818. (*Harris* v. *Doe ex dem.*, 4 Blackford, 371.)

3. Act May 26, 1860, Chap. 61, 12 Stat., 21, 628; Kansas treaty, June 3, 1825, 7 Stat., 245; 10 Opinions, 509.

4. By the Choctaw treaty of September, 1830, arts. XIV, XV, XIX, provision was made that certain heads of families, chiefs, and others, should have reservations respectively of sections of land, a part to be granted in fee, on condition of residence.

The Secretary of War wrote, October 11, 1834, to G. W. Martin, agent, to locate the reservations as follows:

"The register and receiver of the proper land offices will be instructed to reserve from sale the reservations you may locate under this order *until the views of Congress are ascertained.* * * The President specially directs that you transmit *for the action of Congress*, at its present session, detailed reports," &c. (Am. St. Papers, Pub. Lands, vol. 8, pp. 393, 432, 498, 564, 581, 672, 927; vol. 7, pp., 627, 659.)

And President Jackson said, October 13, 1834:

"These locations will be contingent, and will be complete only in the event of their being *sanctioned by Congress.*" (*Ib.*, 394; see vol. 6, pp. 363, 558, 560.)

On the 7th May, 1835, Samuel Gwynn, register, wrote to the Commissioner of the General Land Office:

"Congress has failed to act on the subject. * * and there is no good reason why the Government should not have the disposal of her domain until these claims are sanctioned by an act of Congress. * * The assignees [of claims] were at the last session lobby members in Washington," &c. (*Ib.*, p. 394.)

A report, March 22, 1836, Pub. Lands, vol. 8, 581, says:

"Reservations have been located subject to the confirmation of Congress."

Then came the acts of August 23, 1842, and June 11, 1858, 1 Lester, 73, 299; Choctaw treaty, 1830, art. XIV; and see act March 3, 1857, 1 Lester, 284; and June 11, 1858, 1 Lester, 299; act June 30, 1834, 6 Stat., 596.

The act of March 3, 1837, 5 Stat., 160, ratified possibly many reservations.

5. Act May 30, 1854, 10 Stat., 290, sec., 37.

6. Acts March 3, 1839, March 3, 1843, and August 6, 1846, 1 Lester, 51, 90, 114; Menomonee treaty of 1831 and 1832.

7. Acts March 3, 1843, and July 12, 1852, 1 Lester, 87; Wyandot treaty, 1842.

8. Act June 17, 1844, 1 Lester, 98; Chippewa treaty, January 23, 1838, 7 Stat., 565, 548, 528.

9. Act July 15, 1846, 1 Lester, 110; Chickasaw treaty, October, 1832, and May 24, 1834.

The two preceding treaties are very similar to the Osage treaty.

10. Act March 9, 1848, 1 Lester, 133; 9 Stat., 213; Pottawatamie treaty, October 20, 1832, 7 Stat., 378; see treaty October 17, 1832, 7 Stat., 390; see 9 Stat., 572, 586.

11. Acts July 17 and 31, 1854, and March 3, 1855, 1 Lester, 228, 251, 292, 293; Sac and Fox treaty and Sioux treaty of July 15, 1830.

12. Act March 3, 1855, 10 Stat., 699, sec. 1.

13. Act May 19, 1858, 1 Lester, 292.

14. Act December 22, 1854, 10 Stat., 599; see treaty 7 Stat., 245; Kansas Indians, June 3, 1825, 10 Opinions, 508.

The Attorney General held this act confirmed all *prior* Indian treaty grants. The statute provides:

"That in case of any claim to land in any State or Territory, which has heretofore been confirmed by law, and in which no provision is made by the confirmatory statute for the issue of patents, it shall and may be lawful * * to issue patents for the claim so confirmed."

In 10 Opinions, 508, the Attorney General *ad interim*, construing the VIth article of the Kansas treaty, said:

"The title reserved and guaranteed to them by the treaty itself was a perfect title, and did not need the aid of any subsequent act of Congress to impart to it validity or strength. It was, in my opinion, a title of the class which Congress intended to provide for by the act of 1854, and which they therein designated as any claim to land in any State or Territory which has heretofore been confirmed by law. * * This, then, was a confirmation of the land to them, not only in a mere technical, but in a broader and higher sense of the term. And it was, too, a confirmation *by law;* for by the Constitution the treaties made under the authority of the United States are a part of the supreme law of the land, and it is a well-settled deduction from this rule that 'a treaty is to be regarded as an act of the legislature, when it operates without the aid of any legislative provision.' (*Foster* v. *Neilson*, 2 Pet., 314.) Now, by the terms of the treaty with the Kansas Indians, and without the aid of any other legislation, the right of persons named in the VIth article to the land reserved to them was confirmed, and that confirmation is, in the language of the Supreme Court, 'to be regarded as an act of the legislature.' It is a valid act of the law-making power in one of its forms, as prescribed by the Constitution, and so is, to all legal intents and purposes, 'a confirmatory statute,' within the spirit and meaning of the act of 1854."

But this was a case where the reservations in the VIth article

of the Kansas treaty of June 3, 1825, were expressly ratified by act of May 26, 1860. (12 Stat., 21.)

This opinion, not satisfied with deciding that an act of Congress ratified reservations, proceeds to decide that a *treaty* is a *statute*. And then goes the sublime length of declaring that the treaty power "is the law-making power in one of its forms." But there must be a *limit* to this new legislative power.

15. Act February 28, 1859, 1 Lester, 309, 186; Sac and Fox treaty, 1830, see 1 Lester, 87–94.

16. Act June 9, 1858, 1 Lester, 297, 11 Stat., 312; Delaware treaty, 1854, see 9 Opinions, 25.

17. Act March 3, 1859, 1 Lester, 309, 11 Stat., 431, for all "separate selections" by treaty in Kansas.

"In all cases where, by the terms of an Indian treaty, in Kansas Territory, said Indians are entitled to separate selections of land and to a patent therefor, * * the Secretary of the Interior is hereby authorized to cause patents therefor to issue: * * *Provided*, Nothing herein shall apply to the New York Indians," &c.

18. Acts May 26, 1860, and June 17, 1862, 2 Lester, 18, 69; Kansas Indian treaty, June 3, 1825—12 Stat., 21—*Smith v. Stevens*, 10 Wall., 321.

19. Act June 14, 1862, 2 Lester, 51; for Indians under all treaties.

20. Acts July 14, 1862, and March 3, 1865, 2 Lester, 64, 169; and p. 70, act February 21, 1863; Winnebago treaty, February 27, 1825.

21. Acts March 3, 1863, and March 6, 1868, 2 Lester, 79, 215; Minnesota and Dakota Indians.

22. Acts April 8, 1864, and March 3, 1865, 2 Lester, 86, 148; California Indians.

23. Act July 15, 1870, 17 Laws, 362; Osage treaty of 1865.

24. Act July 15, 1870, 17 Laws, 361; and act February 21, 1863, 12 Stat., 659; Winnebago treaty, April 15, 1859, 12 Stat., 1101, 659.

25. Act July 15, 1870, 17 Laws, 310, sec. 14; Black Bob lands.

26. Act July 25, 1848; Cherokee treaty, 10 Stat., 1048.

27. Act July 27, 1868, 15 Stat., 228; Ex. Doc. 176, 40th

Cong., 2d Sess., February 19, 1868; Cherokee treaty, December 9, 1835, 7 Stat., 483. *

But the case now before the court does not require any decision on the power of the President to execute *international treaties* on international subjects. And I pass on to consider of

PROPOSITION III.

SUBDIVISION II.—*That an* INDIAN TREATY *cannot confer powers on, or require duties of, the President, to execute its provisions* in futuro *for the disposition of the public lands.*

If it be possible that an *international* treaty can be a *law* to executive officers, which can authorize or require them to perform official acts in execution of its provisions, it is so only because the Constitution declares a treaty to be a supreme law.

But if an Indian treaty (so-called) is *not a treaty within the meaning of the Constitution*, then it cannot be a law to executive officers.

Still more, Congress cannot *abdicate* legislative power, and *transfer the power of legislation* to persons or officers whom it may authorize to make contracts or treaties. (*Parker* v. *Com.*, 6 Barr, 515; *Hall* v. *Ohio*, 20 Ohio, 13.) Such a treaty at most could only, to the extent authorized by act of Congress, be effectual, so far as it would operate *ex proprio vigore* to vest specific designated rights.

It could not assume to *repeal existing legislation*, for that is a power reserved to Congress—a *legislative* power.

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* 3 United States Digest, title TREATIES.
Choteau v. *Eckert*, 2 How., 344.
Pollard v. *Files*, 2 How., 591.
Hallet v. *Doe*, 7 Ala., 882.
Webster v. *Reid*, 1 Morris, Iowa, 467.
Kennedy v. *Jones*, 11 Ala., 63.
Bissell v. *Penrose*, 8 How., 345.
Page v. *Scheibel*, 11 Miss., 167.
Ashley v. *Turley*, 13 Miss., 430.
Brown v. *Belmarde*, 3 Kansas, 41; Act 26th May, 1860.
Ruggles v. *Marsilliott*, 19 Wis., 159; Act 3d March, 1843, 5 Stat., 645.
Quinroy v. *Denney*, 18 Wis., 485; Act 3d March, 1843, 5 Stat., 645.
Rose v. *Griffin*, 33 Alab., 717; Act 3d March, 1857, Creek treaty, 1832.
Callefoux v. *Dechaum*, 8 Wis., 286; Act 21st February, 1823.
Haight v. *Keokuk*, 4 Iowa 199; Act June 30, 1834.
Forsyth v. *Reynolds*, 15 How., 358; Act of 1807, Jay's treaty.

If it assumed the form of a contract or promise, the engagement, like every other agreement made by an agent of the Government, would not be a law, but must be executed by law.

The *subjects* to which treaty power extends it is more difficult to decide than the character of the nationalities authorized to make them.

The *subjects* of international laws are *corporate* nationalities, including sovereigns, ambassadors, consuls, diplomatic agents; as also international things, rights, and obligations.

Public international rights and obligations may be enforced by the *via amicabili*, negotiation, arbitration, and the *via facti* reprisals, embargo, war. War calls in requisition the *jus belli*, under which arise the rights of belligerents and neutrals.

Phillimore says:

"States, [nations,] considered in their corporate character, * * have internal and external relations. The internal relations are those which subsist between governments and their subjects in all matters relating to the public order of the State; the laws and principles which govern these internal relations form the subject of public jurisprudence, and the science of the publicist, *jus gentis publicum*. The internal relations of a State may, generally speaking, be varied or modified without the consent of other States, *aliis inconsultis*.

"In the great community of the world, in the society of societies, States are placed in relations with each other. These are the external relations of States.

"From the nature of States, certain rights and obligations towards each other necessarily spring; these are defined and governed by certain laws.

"These are the laws which form the bond of justice between nations, '*quæ societatis humanæ vinculum continet*,' and which *are the subject* of international jurisprudence, and the science of the international lawyer, *jus inter gentes*. To secure by law, *within its own territories*, the maintenance of right against the aggression of the individual wrong-doer, is the primary object of a State, the great duty of each separate society. To secure by law throughout the world the maintenance of right against the aggression of the national wrong-doer, is the primary object of the commonwealth of States, and the great duty of the society of societies." (International Law, p. 2.)

Now, all this is entirely inconsistent with the idea that savage tribes are to be classed in the family of nations and to become legislators, governing the internal concerns of a great nation. They never have been so regarded.

The strongest declaration, I think, which has ever been made in behalf of Indian nationality is that found in the *Cherokee Nation* v. *Georgia*, 5 Peters, decided in 1831, in which it was said:

"So much of the argument as was intended to prove the character of the Cherokees as a State, as a distinct political society, separated from others

capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a State from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character, for any violation of their engagements or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognized the Cherokee nation as a State, and *the courts are bound by those acts.*"

But Chief Justice Marshall then proceeds to say of the Cherokees:

"In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the *United States shall have the sole and exclusive right of regulating the trade with them and managing all their affairs as they think proper.*

"They occupy a territory *to which we assert a title independent of their* will, which must take effect in point of possession when their right of possession ceases; meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our Government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that *any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory* and as an act of hostility."

He then quotes the clause of the Constitution which empowers Congress to—

"Regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

He cites the clause which extends the judicial power to controversies—

"Between a State or citizens thereof, and *foreign* states, citizens, or subjects;"—

And he says:

"In this clause they are as clearly contradistinguished, by a name appropriate to themselves, *from foreign nations*, as from the several States composing the Union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be, in fair construction, applied to them. The objects to which the power of regulating commerce might be directed are divided into three distinct classes: foreign nations, the several States, and Indian tribes. When forming this article, the convention *considered them as entirely distinct.* We cannot assume that the distinction was lost in framing a subsequent article, unless there be something in its language to authorize the assumption."

The Court then decides:

"That an Indian tribe or nation within the United States is *not a foreign state* in the sense of the Constitution, and cannot maintain an action in the courts of the United States."

Mr. Justice Johnson said:

"I cannot but think that there are strong reasons for doubting the applicability of the epithet State to a people so low in the grade of organized society as our Indian tribes most generally are.

"By whom are they acknowledged as such?

"When did they become so?

"And what are the attributes by which they are identified with other States?

"It is clear that, as a State, they are known to nobody on earth but ourselves. If to us, how can they be said to be recognized as a member of the community of nations?"

"Would any nation on earth treat them as such?"

And he said:

"It is clear that neither the *old* or *new* Government did ever consider Indian affairs, or the regulation of our intercourse or treaties with them, as forming any part of our foreign affairs or concerns with foreign nations, states, or provinces."

It is not strange that in a recent case in Kansas the court should be led to declare:

"It may seem to border very closely upon the ludicrous, if not the ridiculous, to see the Government of the United States gravely making a treaty with a few half-naked, half-starved savages, as though these savages were a great nation, and then have it claimed that the treaty thus made is a part of the supreme law of the land, paramount to any act of Congress and to any constitution or law of any of the States." (House Rep. 5, 3d Sess. 41st Cong., January 11, 1871, p. 11.)

In the case of the Kansas Indians, the Supreme Court say, as to the Shawnee Indians:

"If under the *control* of Congress from necessity, there can be no divided authority." (5 Wallace, 755.)

In *Jackson* v. *Goodell*, 20 Johns. R., 193, Kent said of the Indians:

"They have always been and still are considered by our *laws as dependent tribes*, * * subject to our coercion."

And he speaks of them as—

"Having put themselves *and their lands* under the protection of the British Crown."

The Indians are in no sense either *foreign nations* or *independent nations*. They are "domestic, dependent nations." (5 Peters, 1.) And many, very many, acts of Congress have regulated trade and intercourse with the Indian tribes. This is abundantly shown in 5 Peters, 1. They have always been regarded as *subject to the legislative power;* so much so that even a *treaty* could not protect them from taxation under the authority of Congress. (*Boudinot's Case*, 11 Wallace's Rep.)

The power to make Indian treaties is placed on a different footing from international treaties. Indian treaties have been authorized by numerous acts of Congress, showing that they are under legislative authority. And so the Constitution treats them. The Constitution authorizes the President to—

"Appoint embassadors, other public ministers, and consuls." (Art. II, sec. 2.)

These are officers known to *international* law. The power to appoint them is so high that it cannot be taken away by act of Congress. They are the general officers who, in the sense of the law of nations, can *make treaties.*

Yet no ambassador or minister or consul has ever been accredited to any Indian tribe by this or any other nation. The Constitution gives Congress power "to regulate commerce with foreign nations, between the States, and with Indian tribes." It gives the President power to appoint officers to make international treaties, but makes no provision for such officers to make Indian treaties. It leaves them to legislation.

The Constitution recognizes the law of nations as a part of our law, and says:

"Congress shall have power * * to define and punish offenses against the law of nations."

In British North America the Indians are managed and subjected to laws and regulations without treaties. (House Mis. Doc. No. 35, 2d Sess. 41st Cong.)

It was at a very early day doubted whether a treaty could be made with an Indian tribe at all. It was said that treaties could only be made between independent nations.

On the 9th of January, 1817, Governer Morrow made a report in the United States Senate, in which he said, in relation to Indian treaties and public lands:

"The grant of power to make treaties is undefined by the Constitution, which has been considered to extend to all subjects, proper for a treaty regulation, with other *independent States, except the cases in which the special grant of power to other branches of the Government* may operate as a *restriction* to its exercise."

He then says that a former Congress, regarding the grant of power to Congress "to dispose of the public lands" as a limitation on the treaty-making power, expressly, by the act

of March 26, 1804, authorized the President to stipulate with the Indians for an exchange of lands. (Am. State Papers, Indian Affairs, vol. 2, pp. 222, 410.)

And Congress accordingly from time to time passed acts to authorize Indian treaties, as, for instance, the acts of—

1. August 20, 1789, 1 Stat., 54. The power of the President and Senate under this act was discussed in Cabinet February 25, 1793. (4 Hamilton's Works, 340; 9 Jefferson's Works, 135.)

2. March 26, 1804, 2 Stat., 289, sec. 15. Am. St. Pap., vol. 2, Indian Aff., 224, 124, 410; 1 Benton Abr., 671.

3. May 28, 1830, 4 Stat., 411; 7 Stat., 551. See act June 30, 1834, 4 Stat., 740.

4. June 5, 1850, 9 Stat., 437; 1 Lester, 156.

5. February 27, 1851, 9 Stat., 586, sec. 3, requires "all Indian treaties to be negotiated by such officers and agents of the Indian Department as the President * * may designate."

6. March 3, 1853, 1 Lester, 204.

7. December 19, 1854, 1 Lester, 241.

8. March 3, 1863, 12 Stat., 793.

9. February 23, 1865, 13 Stat., 432.

10. June 15, 1866, Joint Res., 14 Stat., 358.

11. March 29, 1867, 15 Stat., 9.

12. July 20, 1867, 15 Stat., 17.

13. July 1, 1870, Joint Res., 17 Stat., 384.

14. March 3, 1871, prohibits treaties.

Mr. Benton's Notes to the Abridgement of the *Debates on Jay's Treaty* says:

"The course (making appropriations for Indian treaties) was long followed, *no Indian treaty being held, except authorized by an act of Congress*, which was the legislative consent to the grants of money such treaties usually contain, and for the payment of which an act of Congress would be necessary. And in the two great cases of acquiring foreign territory, (Louisiana and Florida,) under Presidents contemporary with the formation of the Constitution, and which required large appropriations to carry them into effect, the consent of the legislative branch of the Government was sought and obtained before the executive began to act; the law in both cases originating in the House of Representatives as the proper initiatory branch where money was to be paid, which the people would have to raise." (1 Benton's Abr., 671).

15. On the 26th of March, 1804, Congress passed an act for the disposal of the public lands in the Indian territory, and

another for the government of Louisiana Territory, section 15 of which provides that—

"The President of the United States is hereby authorized to stipulate with any Indian tribes, owners of lands on the east side of the Mississippi, and residing thereon, for an exchange of lands, the property of the United States, on the west side of the Mississippi, in case the said tribes shall remove and settle thereon; but in such stipulation the said tribes shall acknowledge themselves to be under the protection of the United States, and shall agree that they will not hold any treaty with any foreign power, individual, State, or with the individuals of any State or power; and that they will not sell or dispose of the said lands, or any part thereof, to any sovereign power except the United States, nor to the subjects or citizens of any other sovereign power, nor to the citizens of the United States; and the act of March 30, 1802, 'to regulate trade and intercourse with the Indian tribes,' &c., is extended to the territory erected by this act."

I have already quoted the act of May 28, 1830.

16. As to the effect of this act, see opinion of Attorney General Butler, 3 Opinions, 56.

The Act of June 5, 1850, authorizes the President to—

"Appoint Commissioners to negotiate treaties with the several Indian tribes in the Territory of Oregon, for the extinguishment of their claims to lands lying west of the Cascade mountains."

Under these acts many of the Indian treaties have been made, either in obedience thereto or in excess of the authority so conferred. In other instances, acts have been passed to carry into effect such treaties.

Whether there is a constitutional power to make Indian treaties or not, it is clear the power is not so high, or of that character, with the authority to make treaties with foreign nations. The Indian treaty power may be regulated by act of Congress fully, while the foreign treaty power is much less liable to restriction and regulation by act of Congress. The Indians have in all respects and always been subject to control by act of Congress.

In 6 opinions, 664, Attorney General Cushing says:

"There is distinction undoubtedly between a treaty with a foreign power and a treaty with Indians, who are subjects of the United States. Examples may be cited of acts of Congress, which operate so as to modify or amend treaties with Indians. * * Though they may be weak, and we strong—they subjects, and we masters—yet they are * * entitled to the exercise of good faith." &c.

Congress, by act of March 30, 1802, (2 Stat., 141, sec. 12,) and act of June 30, 1834, (4 Stat., 792,) prohibited the Indians from making treaties with foreign nations, and from selling their right of occupancy in lands except to the United States.

No such power could be exercised over foreign nations. Congress has always regulated trade and intercourse with Indians, and subjected them to our revenue laws, (Boudinot's Case, 11 Wallace;) but this could not be done over foreign nations.

And now, under act of July 15, 1870, the Osages are being removed from their diminished reserve, and their lands sold to settlers. If the Indians themselves can be thus regulated and subjected to acts of Congress, their power to make treaties may be regulated, restrained, or prohibited.

The act of Congress of March 3, 1871, (Laws, 566,) declares that no Indian tribe shall be acknowledged as a power with whom the United States may contract by treaty.

If the power to make *Indian treaties* be in fact a part of the treaty power of the Constitution, to make treaties which are supreme laws, it could not be withdrawn, or its exercise prohibited by Congress. It could no more be withdrawn than the original jurisdiction of the Supreme Court, or the President's power to grant pardons, expressly delegated by the Constitution. Here, then, in this act, it is proved by the official oaths of more than three hundred members of Congress, including the members of the treaty-making Senate, that the power to make Indian treaties *rests on legislative authority*, or at least is not of that *character* which can make treaties having the effect of *supreme laws*.

When the constitution speaks of treaties which are to operate as supreme laws, it can only refer to treaties as understood by all nations.

It is a rule of interpretation, well understood, that when a common-law word is used in a constitution or law, it is to be understood in its common-law meaning.

The word treaty is a term which belongs to international law, and must be understood in the sense of international law, at least in the clause which makes a treaty a supreme law. It must be presumed the framers of the Constitution used it in that sense. The treaties of the Constitution are *fœdera gentium*.

Indian treaties are not *fœdera gentium*, and are, therefore, not laws within the Constitution.

The position of the Indians is peculiar; any treaty they make is *sui generis*.

An international treaty is not *sui generis*. Bouvier says:

"A *treaty* is a compact made between two or more *independent nations* with a view to the public welfare."

The Committee on Foreign Affairs at the 2d session of the 40th Congress, (Rep. 37, May, 18, 1868,) say:

"A *treaty* is a *compact between sovereign nations*."

And this was manifestly the opinion of Hamilton and Madison, as may be seen from the Federalist and Helvidius. Hamilton declares, and Madison approves the declaration, that—

"The power of making treaties * * relates neither to the execution of the subsisting laws nor to the *enaction of new ones*, and still less to the exertion of the common strength. *Its objects are contracts with foreign nations* which have the force of law, but derives it from the obligations of good faith. They are *not rules prescribed by the sovereign to the subject*, but *agreements between sovereign and sovereign*." (Federalist, No. 75; Helvidius, No. 1; Writings of Madison, vol. 1, p. 620.)

At the time the Constitution was adopted, no treaty of England had ever imposed duties on an executive officer, and none had ever been executed except by authority of an act of Parliament. The Constitution must be read in the light of this history, or, as Mr. Justice Baldwin said, in 5 Peters, 40:

"To correctly understand the Constitution, then, we must read it with reference to this well-known existing state of our relations with the Indians; the United States asserting the right of soil, sovereignty, and jurisdiction in full dominion; the Indians occupants of allotted hunting-grounds."

The first treaty which ever stipulated that lands should be surveyed and sold was the Cherokee treaty of February 27, 1819. (7 Stat., 197.)

But that was a mere stipulation, requiring legislation to execute it.

And it did not, upon that subject, attempt to designate any officer to perform any duty.

Not until long after the Constitution was adopted did any treaty attempt to impose any duty on any officer.

The position which I am now maintaining does not conflict with those cases which have said that certain Indian treaties were to be regarded *by the courts* as laws to them.

Those were cases where the rights of parties litigant were under judicial review. And many of the Indian treaties have

been, so far as those rights were concerned, *authorized or ratified by acts of Congress.*

This was so with the treaty referred to in *United States* v. *Brooks*, 10 How., 442; and in *Turner* v. *Am. B. Mis. Soc.*, 5 McLean, 349; in *Fellows* v. *Blacksmith*, 19 How., 366; in *Wilson* v. *Wall*, 6 Wall., 83, &c.

I conclude, then, that an Indian treaty is not within the Constitution a *law* to the executive officers of the Government.

I proceed now to consider the proposition that—

PROPOSITION III.

SUBDIVISION III.—*An Indian treaty cannot impose duties or confer powers on the Commissioner of the General Land Office or Secretary of the Interior, mere statutory officers, and especially not when, as in this case, the attempt is made to require the power to be exercised independent of the President.*

The Cherokee treaty provides that the neutral lands—

"Shall be surveyed as the public lands of the United States are surveyed, under the direction of the Commissioner of the General Land Office," &c.

And the Secretary of the Interior is required to perform various acts preparatory to the issuing of patents.

If the treaty does not or cannot authorize the performance of these acts, the attempt to do so was unauthorized and void, and could not sustain any claim to title acquired by reason of them.

And I maintain that the treaty could not, and did not, confer the power to perform these acts for many reasons.

1. These officers are created, and their powers defined by acts of Congress. The declaration of powers by these acts is equivalent to an expression that they shall exercise no other powers. "*Expressio unius exclusio alterius.*" It is a positive regulation and restraint upon the Indian treaty power, whether exercised by virtue of the Constitution or acts of Congress.

The question whether an *officer created by act of Congress* for a *designated purpose*, and with powers *limited by law*, can go beyond that and execute a treaty, is very different from

the question whether an officer, *created by the Constitution* for *all* executive purposes, both of treaty and acts of Congress, can so execute a treaty.

But when an act of Congress has created an office and defined its duties, a treaty cannot intervene to prevent their performance.

2. The powers of statutory officers are conferred by legislation. It is essentially an exercise of *legislative power* to confer official authority.

If the President could have inherent executive authority, the Secretary of the Interior and Commissioner of the General Land Office have none, except as an incident of power conferred by act of Congress. Whatever an international treaty may do, *ex proprio vigore*, it cannot usurp *legislative power*. And certainly an Indian treaty cannot. If it can legislate on any one subject, it may on all. If it can *add to* the existing powers of the Secretary of the Interior by so legislating, and especially in the face of the acts creating the office with their implied negative on all other powers, it can *take away* the authority already conferred by statute. It can do none of this, for a treaty cannot legislate. Judge Story says:

"The power to make treaties is neither a legislative nor an executive power."

And for this and other reasons, in England, it has always been held that a treaty could not legislate duties on executive officers of the government.

There cannot be two hostile and conflicting legislatures operating at the same time on the same subject-matter. No man can serve two masters. God and mammon are not *concurrent*.

Then, again, the Cherokee treaty is void in the particulars referred to, because—

3. *It attempts to create offices* and make appointments to office. If a treaty, or even an Indian treaty, could be a law, so far as it operates *ex proprio vigore*, or even to the courts, it cannot *create offices* or fill them by appointment.

By the express terms of the Constitution, offices are such only as are created or designated in it, as that of the Presi-

dent, Vice President, &c., or such as may be "established by law." (*United States* v. *Maurice*, 2 Brock., 96.)

And here the word "law" is used in the sense of an act of Congress as completely as in the clause relating to the appropriation of money.

Now, when the Secretary of the Interior and the Commissioner of the General Land Office are performing the official duties required by the treaty, they are *quo ad hoc* performing duties not required of them by virtue of the acts creating their offices; they are performing duties for which they were never "appointed by the President, by and with the advice and consent of the Senate," as the Constitution requires.

These duties are imposed *solely by the treaty*. For all *such* purposes they exercise the duties of *offices* not "established by law," not by act of Congress.

If this can be done, the treaty power can seize upon some obscure office "established by law," as a justice of the peace in the District of Columbia, or, if an executive office be better, a constable or notary public in a Territory, and attach to *such* office and devolve on *such* officer the disposition of the public lands, the management of Indian affairs, and the whole expanding range of treaty duties. This may be an extreme case, but it must show that a construction of the Constitution which admits of such a perversion of its purposes is not to be tolerated.

If this can be done, the whole purpose of the Constitution, in requiring offices to be created by act of Congress and appointments to be made by the President, can be evaded. Congress may create an office for one purpose; a treaty may pervert it entirely to another purpose.

When the Constitution requires offices to be "established by law," it requires that their duties shall be imposed by the same kind of law; for, if an office has duties not imposed by *such law*, it is not, as to *such duties*, an office "established by law."

The oath of office and bond of a revenue officer are for purposes of an office "established by law," and for duties imposed by the same kind of law. Can such officer be required by

an Indian treaty to collect the proceeds of the land sold under this treaty, and disburse it at his discretion?

If, as in this case, such duties can be devolved on the Secretary of the Interior without official bond, why may not the proceeds of all lands be collected and disbursed in the same way?

There is here no officer who as to these lands is Secretary of the Interior. As to this the treaty is not an operative law. (13 Howard, 51.)

In fact, if it is once conceded that a treaty can legislate on any *legislative subject*, about a *subject-matter* not *international*, the legislative power of the Government can be subverted.

The Cherokee treaty, so far as it attempts to impose duties on the Secretary of the Interior and Commissioner of the General Land Office, is void, because

4. *The treaty power cannot interrupt or prevent the performance of duties imposed by law on officers whose offices are established by law.*

Let us see what is the *effect* of the claim set up here, that the Cherokee treaty can exact duties of the Secretary of the Interior and Commissioner of the General Land Office. There is, under the Constitution, a national Government and subordinate State governments. Each is in most respects independent of the other for its appropriate purposes. Each has its orbit, and neither one can encroach on the other.

It has been decided by the highest court that a State cannot lay a tax, or otherwise

"retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into effect the powers vested in the national Government."

And quite recently, that Congress cannot tax the salary of State officers or impede the operations of a State government. (*McCulloch* v. *Maryland*, 4 Wheaton, 316; *Osborn* v. *Bank United States*, 9 Wheaton, 738; *Weston* v. *Charleston*, 2 Peters, 449; *Brown* v. *Maryland*, 12 Wheaton, 419; *Dobbins* v. *Erie Company*, 16 Peters, 435; *Bank Commerce* v. *New York*, 2 Black, 620; *Van Allen* v. *Assessors*, 3 Wallace, 585.)

A State cannot tax the national bonds, or the "greenback"

currency. This is so, not because of any express limitation upon the power of a State or of any express exemption reserved to the national Government; but, from the necessity of the case, a power lawfully put in operation can tolerate no interfering or antagonistic power.

Chief Justice Marshall says—

"1st. That a power to create implies a power to preserve. 2d That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, those powers to create and preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield, to that over which it is supreme."

And he says, if we admit that a State may tax the operations of the Government—

"We shall find it capable of arresting all the measures of the Government, and of prostrating it at the foot of the States."

Between the national Government and the States, then, for all appropriate purposes the rule is—*non-intervention*. Neither can interfere with or arrest the operation of the other.

But the national Government has its three departments—legislative, executive, and judicial—each in many respects independent of the other, and the treaty-power department, which is fast becoming the most powerful and independent of them all.

Each has its orbit in which to move. Each must move in its orbit without interfering with, or certainly without destroying, any other.

This principle is essential to national existence—to the existence of each department. It results from the structure of the Government. It results from the decisions of the courts which I have just cited. It is the theory of the British government. It is the theory of every government which does not tolerate an uncontrollable consolidated despotism in the hands of one man or a select few.

The Constitution is capable of being so construed as to deny to any one power or department of the Government the capacity to destroy any other of its departments or officers. If the duty to sell these lands may by treaty be devolved on the Secretary of the Interior, *every duty* which can be imposed by all treaties may be so exacted. He may be required

to go in person among savage tribes, and superintend operations in Alaska. If the treaty power can exact these duties, it may impose them in turn upon other departments or officers, so as to defeat the performance of all other duties. The treaty power is not to be measured by what it *has done*, or is doing, but what it *can do*, and we must look to that to ascertain if it is as unbounded as it claims to be. If it can usurp the power now claimed, it can usurp every power of the Government, and every officer must yield to its behests.

It could thus not only annihilate the duties of all existing officers, but the whole legislative power of Congress to dispose of the public lands, and defeat every power of Congress.

But the duties imposed by act of Congress on the Secretary are constitutional, and, as such, they are *supreme duties*. A supreme duty must disregard every other which is repugnant to it.

The Cherokee treaty undertakes to provide for the survey and sale of lands; and if it can do this it can establish a general land office, make surveys, annihilate existing offices, and usurp all their powers, or exclude them from the performance of duties exacted by law, in pursuance of the Constitution.

A treaty requiring the performance of acts *in futuro* by officers *not created by the Constitution* can only be made effectual by an act of Congress to execute it. So it has always been understood by every jurist and statesman whose opinions are entitled to weight.

The President, in his recent annual message, referring to the last treaty with Great Britain, says:

"This treaty provides methods for adjusting the questions pending between the two nations. Various questions are to be adjusted by arbitration. I recommend Congress, at an early day, to make the necessary provisions for the tribunal at Geneva, and for the several commissions on the part of the United States called for by the treaty."

And again he says:

"I recommend the legislation necessary on the part of the United States to bring into operation the articles of the treaty relating to the fisheries and to the other matters touching the relation of the United States toward the British North American possessions, to become operative as soon as the proper legislation shall be had on the part of Great Britain and its possessions."

The position I am discussing is supported in principle by adjudged cases.

Congress cannot require duties *not judicial* from judges, as such. (*U. S.* v. *Ferreira*, 13 Howard, 51; 1 Abb. Pr., 191, 296, n.; *U. S.* v. *Ritchie*, 17 Howard, 525; *U. S.* v. *Todd*, 13 Howard, 52, n.; *Humphrey* v. *U. S.*, Dev., 204; *Murray* v. *Hoboken*, 18 How., 272; *Exp. U. S.*, 1 Gall., 338; 1 Court Cl., Nott & H., xxxiii.)

The treaty power cannot impose *treaty duties* on judges. This was proved in March, 1800, by the great speech of Marshall (Wharton St. Tr., 443,) and decided in 2 Peters, 307, where Chief Justice Marshall said:

"The judiciary is not that department of the Government to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established."

How, then, can a treaty impose treaty duties on officers whose *exclusive duties* are, by the law which "establishes the office," dedicated to other purposes?

The Constitution has vested "the judicial power in one Supreme Court, and in such inferior courts as Congress may from time to time establish."

Can a treaty exact judicial duties of the courts established by Congress?

If not, can a *treaty* exact treaty duties of an executive officer?

5. Finally, on this branch of the subject the title claimed under the Cherokee treaty is void, because the measures to create and perfect it have neither been done under legislative or treaty power.

Whatever has been done under and since the treaty, has been without an act of Congress to execute it.

The treaty, in attempting to dispose of these lands, has abdicated treaty power.

If a treaty could, *ex proprio vigore*, without a patent as evidence of title, transfer a fee simple or dispose of the public lands, that is one view of its power. This may have been claimed.

But if this could be possible, it does not prove that *this treaty* could be executed in the manner it attempts to require.

If there be a treaty power to dispose of the public lands, it is a power *which requires the discretion and judgment* of the President and Senate in the *very act or performance of the duty of fixing terms, designating the lands, and deciding if the the terms are complied with.*

The power to *make laws* cannot be abdicated by Congress. (*Parker* v. *Com.*, 6 Barr, 515; *Hall* v. *Ohio*, 20 Ohio, 13.)

The power to say what shall be the amount of a judgment cannot be delegated by a court to its clerk, nor can Congress transfer the right to make such determination.

Can the President, or even an act of Congress, delegate to subordinate officers the execution of the duty imposed by the Constitution on the President of appointing "public ministers?"

If not, whatever act is to be done by treaty power must have the discretion and judgment of that power exercised in its performance.

Could a treaty, unaided by act of Congress, be effectual, which would provide that a marshal in Montana should, in *his discretion*, acquire and annex a portion of Canada or surrender part of Alaska? Would not that be an abdication or transfer of the treaty power?

How, then, can a treaty transfer treaty discretion in *selecting* lands for sale and fixing their price?

I insist, then, in the language of a report to Congress on this subject—

"That the Secretary of the Interior is an officer of the United States; that his duties are defined, and imposed upon him by acts of Congress; and that the treaty-making power is not competent to add to or to take from his duties; that it was not possible for the treaty-making power to confer on him the duplex character of an officer 'for and in behalf of the United States' and of 'trustee for the said Cherokee nation of Indians;' that, if a trustee was to be appointed to dispose of these lands, such appointment could only be made by Congress, as the only possible source of the power to do the thing which the trustee purports to have been appointed to do."

Proposition IV.

The Cherokee treaty, so far as it stipulates for a disposition of lands, is void, because in conflict with the act of July 22,

1854, (10 Stat., 310,) *and to the act of June* 2, 1862, (12 Stat., 413.)

If *any one* of the positions already maintained be correct, it will not be necessary to inquire further. But I proceed to other questions.

The acts of 1854 and 1862 declare that these lands shall be subject to pre-emption "whenever the Indian title shall be extinguished." The Indian title *was extinguished* by the Cherokee treaty of 1866.

Unless, therefore, the treaty could and did defeat the operation of the acts of Congress, no title could be acquired by a purchaser under it, and James F. Joy is without any valid claim. I insist that the acts of Congress shall prevail over the treaty.

The act of Congress of March 3, 1863, (12 Stat., 793, secs. 4, 5,) authorized the "President to enter into treaties with the several tribes of Indians *residing in Kansas.*"

The Cherokee tribe did not reside in Kansas. The tribe occupied lands and resided mainly in the Indian country south of Kansas. This act gave no authority, except in cases where the *whole tribe* resided in Kansas.

If, then, the power to make this treaty rested wholly on the act of 1863, it would be wholly unauthorized. So far as it extinguished the Indian title, it *was authorized* by the act of 1854 and 1862, which contemplated the treaty extinction of all Indian titles, for the purpose of subjecting all the public lands to pre-emption. But whether this treaty rests on a power given by the Constitution or by acts of Congress, the acts of 1854 and 1862, which dedicate these lands to pre-emption settlement, are *supreme* over the treaty for many reasons.

1. *As "regulations" of the exercise of the treaty power, they are supreme.*

That Congress can by law "*regulate*" the exercise of all executive and judicial power has often been asserted and never denied. It is expressly delegated to Congress by that clause of the Constitution which gives the power to "make all laws necessary and proper," &c. The only question has been as to the extent of the regulations.

Mr. Marshall, in his speech in Congress on the 4th of March, 1800, on the extradition of Robbins, said, in discussing the power of the President:

"Congress unquestionably may prescribe the mode, and Congress may devolve on others the whole execution of the contract, [extradition treaty."] (Wharton, St. Tr., 452.)

Attorney General Akerman, in his opinion of August 31, 1871, in relation to the Civil Service Commission, said:

"Though the appointing power alone can designate an individual for any office, either Congress, by direct legislation, or the President, by authority derived from Congress, can prescribe qualifications, and require that the designation shall be made out of a class of persons ascertained by proper tests to have those qualifications." (And see Globe, vol. 74, p. 20.)

Story, referring to the executive power, says:

"Laws may check and restrain and bound its exercise. * * The legislative power, except in the few cases of constitutional prohibition, is unlimited. It disposes of all its [the Government] property." (1 Story Const. 374.)

The Constitution itself gives Congress power to

"make all needful rules and *regulations* respecting the territory * * belonging to the United States."

Here, then, is the double power to make regulations as to treaties and lands.

The acts of 1854 and 1862, by making these lands subject to pre-emption, when the Indian title should be extinguished, authorized a treaty to be made to extinguish the Indian title.

After the long series of acts of Congress regulating and limiting the making of Indian treaties, it is too late to question or doubt the power of Congress in this respect. If this treaty was made under the act of 1863, then it was the Power of Attorney of the President. He could not go beyond it, or treat on a subject-matter not covered by it. By it he was authorized—

"To enter into treaties with the tribes of Indians * * in Kansas *for the extinction of their titles* to lands held in common, * * and for *the removal* of said tribes."

The subject-matter upon which he could treat was the Indian right of occupancy and their removal. The power to treat is a power to make contracts—to make a treaty at common law—not treaties having the effect of municipal laws. It was not a power to do what Congress only could do. The power here did not extend to the *fee simple* of these lands.

It was not a power to *sell* the fee. It was a power to agree to pay money, just as a power to buy is a power to buy for cash. When a principal authorizes an agent to purchase a horse, he does not thereby confer a power to sell his farm to pay for him.

And whatever power the act gave the President, he was bound to exercise *in obedience to other acts* of Congress. *His power was not a power to repeal acts of Congress.* The acts of 1854 and 1862, which *made these lands subject to pre-emption entry the moment the Indian title should be extinguished*, were a part of the President's Power of Attorney, and *limited his authority.* If he could sell these lands, he could sell all the lands of the United States by Indian treaties. The act of March 3, 1863, then, did not "authorize the President to make *this* treaty;" certainly not, except so far as it extinguished the Indian title. It exceeded his power, and therefore has no validity, except so far as it extinguished the Indian right of occupancy.

The acts of 1854 and 1862 equally regulated and limited the power to make this treaty, whether made under the act of 1863, or if it could be made under the Constitution.

And if the authority to make it implied also the power to use other means than the payment of money, (3 Opinions 56; 1 Kent, 166, as to *international* boundary,) in the *absence of a restraining statute*, yet Congress could and did, by declaring that these lands *shall* be subject to pre-emption, withdraw them from the treaty power as a means of making it. Congress had power over the *means* which the treaty power might employ.

And if *some* treaties may repeal *some* acts of Congress, yet a power which is itself regulated by law cannot repeal the power which regulates it.

Alexander Hamilton, discussing the treaty power, said:

"It is a fundamental maxim, that a delegated authority cannot alter the constituting act, unless so explicitly authorized by the constituting power. An agent cannot new-model his own commission."

It was said by Judge Curtis, in his article on executive power, published in October, 1862, and proved with great

power, that "the mere authority to command an army is not an authority to disobey the laws of the country." (4 West Law Mo., 519.) And if this be so in time of war, how can a power, to make an Indian treaty in time of peace, be construed an authority to disobey and repeal the acts of 1854 and 1862, which regulate and limit its exercise?

Hamilton, in his letter to Smith, on Jay's treaty, March 10, 1795, discussing the proposition of Madison, that the House of Representatives was *deliberative*, not *executive*, in passing laws to carry out treaties, said:

"The legislature * * is *deliberative*, but with *various* restrictions, not with *unlimited discretion*. * * By constitutional injunction, the House * * *quo ad* the stipulations of treaties * * are not deliberative, but merely executive, *except as to the means of executing*. * * A treaty, which is a contract between nation and nation, abridges the legislative discretion * * by the *moral obligation* of keeping its faith." (6 Ham. Hist. Repub., 360; and see 7 Hamilton's Works, 556.)

Here is a concession that Congress can *regulate* the treaty power.

If it should be conceded that the treaty power—the President and Senate—cannot be regulated in any respect; that they are over and above all law; yet *the Commissioner of the General Land Office and the Secretary of the Interior—mere statutory officers—are not beyond the control of law.*

The acts of 1854 and 1862 operated as a regulation of and restraint on their powers. If so, they could perform no duty in opposition to these acts.

For if this is not so, then the treaty power can repeal the laws creating the Interior Department, and set up a land office of its own.

In *Cherokee Nation* v. *Georgia*, 5 Pet., 44, Mr. Justice Baldwin commented on the clause of the Constitution which gives Congress power to dispose of the public lands, and said:

"It is the same power which was delegated to the old Congress, [under the confederation,] and, according to the judicial interpretation given by this court, in *Gibbons* v. *Ogden*, 9 Wheat., 209, the words 'to regulate,' imply in their nature *full power* over the thing to be regulated. *It excludes necessarily the action of all others that would perform the same operation on the same thing.*"

And see Annals of Congress, 1796, p. 526.

"The same power delegated to the old Congress," says

Justice Baldwin. And by this he means "the transcendent power of Parliament." (*Ib.*, 4.)

In 3 Opinions, 56, Butler, Attorney General, held, in substance, that the provisions of the Choctaw treaty of September 27, 1830, (7 Stat., 33,) which secured reservations, *were authorized* means [by act of May 28, 1830, 4 Stat., 411,] to extinguish the Indian title. If Congress could *authorize such means*, it could *withhold* them.

2. *If there be a treaty power concurrent with the undoubted expressly delegated power of Congress to dispose of the public lands, the legislative power is supreme.*

This proposition involves an inquiry into the nature and structure of our Government. But it may be solved by the analogy of our Constitution to that of Great Britain. I do not now inquire whether the power of Congres is *exclusive*. But in case of conflict it is *supreme*. Congress does not have *so many* subjects of legislative jurisdiction as Parliament, but on most of those over which it exercises an express delegated authority, the legislative power is as *omnipotent* as is the British Parliament.

This is especially so as to the public lands, as we will see from the words in which the power is given to Congress to dispose of them, and from the history which led to their introduction into the Constitution.

THE ARGUMENT DEDUCED FROM HISTORY.

Supremacy of legislative power in England.

There is, and always was, a plenary power in Parliament to dispose of the public lands of Great Britain. Prior to the American Revolution, there was also a *prerogative power* in the Crown to dispose of the public lands in the colonies.

George III, by proclamation of 7th October, 1763, established territorial governments, and authorized their governors to grant away lands in the colonies in his name. (1 Am. Archives, 4th series, 1774–'75, pp 172–185; *Ib.*, vol. 2, p. 171; Am. St. Papers, Pub. Lands, vol. 8, 791; King of Spain, *Ib.*, Pub. Lands, vol. 4, p. 84; King of England, Am. St.

Papers, Pub. Lands, vol. 4, p. 85; vol. 1, 532; vol. 8, pp. 21, 252, 289; 9 Peters, 748; 8 Wheat., 536, 541.)

And see the charters granting lands to inhabitants of Massachusetts Bay, Rhode Island, Virginia, Pennsylvania, and Maryland. (House Rep. No. 12, 3d sess. 41st Congress, p. 13.*)

The prerogative power of sale was exercised, regardless of Indian occupancy.

"Nor has any title beyond the right of occupation been recognized in the native tribes by any of the European governments or their successors, the colonies, the States, or the United States." (3 Washburn Real Prop., 164, [518;] *Mitchell* v. *U. S.*, 9 Peters, 746.)

That Indians could convey no fee. (Am. St. Papers, Pub. Lands, vol. 4, p. 93, and vol. 1, 533; Rep. of Morrow in Senate, Feb. 17, 1807; 9 Peters, 735; 8 Wheat., 534.)

But while these two powers were *concurrent*, it was absolutely necessary that one should be *supreme;* and Parliament was supreme.

Cruise, in his Digest of the Law of Real Property, says:

"It is somewhat doubtful whether our Kings were formerly enabled to alien

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**Prerogative power of sale by Crown*, 8 *Peters*, 451; 9 *Peters*, 452.
Marshall v. *Clark*, 4 Call, (Va.,) 268.
Jackson v. *Porter*, Paine, 467.
Halloway v. *Buck*, 4 Litt., 293.
Kennebec, Propr. v. *Lowell*, 2 Greenl., 149.
Penn v. *Klyne*, 1 Wash. C. C. R., 207.
Fairfax v. *Hunter*, 7 Cranch, 603.
Winn v. *Cole*, Walker, (Miss.,) 119.
United States v. *Acosta*, 1 How., 24; S. C., 17 Pet., 16.
United States, v. *Moore*, 12 How., 209.
People v. *Clarke*, 10 Barb. Sup. Ct., 120.
United States v. *Repentigny*, 5 Wallace, 211.
McKinron v. *Blies*, 31 Barb., (N. Y.,) 180.
Johnson v. *McIntosh*, 8 Wheat., 543.
Clancy v. *Houdlett*, 39 Me., (4 Heath.,) 451.
Choteau v. *Moloney*, 16 How., 203.
People v. *Schermerhorn*, 19 Barb, (N. Y.,) 840.
United States v. *Davenport*, 15 How., 1.
3 Washburn Real Property, 165; Worcester *v.* Georgia, 6 Pet., 544.
3 Washburn, 183; Johnson *v.* McIntosh, 8 Wheat., 543.
"The right of soil, and more or less of sovereignty, were granted [by the King of England] to companies or proprietors by letters patent, under which communities were formed, with greater or less powers of jurisdiction and government, into *colonies, provinces,* or *proprietaries.* (3 Washburn, 165; 6 Pet., 544.) The *chartered* colonies were Massachusetts, Rhode Island, and Connecticut. The *provinces* were New Hampshire, New Jersey, Virginia, the two Carolinas, and Georgia. The proprietaries were Maryland, Pennsylvania, Delaware, and New York." (*Ib.*; 1 Curtis Const., 425.)

the *crown lands*, for although the conqueror and his sons granted away great estates to their followers, yet these were, in general, forfeitures that had accrued to the crown. In process of time, however, our kings certainly exercised the right of granting the crown lands at their pleasure. But the exercise of this *prerogative* having greatly impoverished the crown, *it has been restrained by several modern laws.* (Book 5, p. 46, sec. 10)

This doctrine of the prerogative power of the crown to grant the public lands originated with the Norman conqueror, who compiled the Domesday Book, and at the council of Saram the allodial tenures were destroyed; and—

"In consequence of this change, it became a fundamental maxim * * that the king is the universal lord and original proprietor of all the lands of the kingdom, and that no man doth or can possess any part of it but what has mediately or immediately been derived as a gift from him, to be held upon foedal services." (2 Blackst., 51; 1 Co-Litt., 915.)

The ingenious device was not yet invented of a treaty repeal of the supreme laws of Parliament.

There was, under British rule, no treaty power of disposing of the public lands for individual ownership, even by international treaties, much less by Indian treaties. The Indians were denied all power of sale. But treaties were made by which they surrendered a possessory right, or rather an occupancy by sufferance, in the form of a sale of the lands, and these, when approved by authority of the crown, gave a fee simple to individual purchasers. But the title passed, *not by the treaty*, but *by the crown license*, and of course would have passed by this, without any treaty.

Thus, in *Mitchell* v. *The United States*, (9 Peters,) in speaking of the colonies, it is said:

"Individuals could not purchase Indian lands without permisssion or license from the crown, colonial governors, or according to the rules prescribed by *colonial laws*, but such purchases were valid with such license or in conformity with the local laws; and by this union of the perpetual right of occupancy with *the ultimate fee which passed from the crown by the license*, the title of the purchaser became complete. * *

"It was a universal rule that purchases at Indian treaties, in the presence and with the approbation of the officer under whose direction they were held, by the authority of the crown, gave a valid title to the lands; it prevailed under the laws of the States after the Revolution, and yet continues in those where the ultimate fee is owned by the States or their grantees. * *

"This rule in the colonies was founded on a settled rule of the law of England, that by his *prerogative*, the king was the universal occupant of all vacant land in his dominions, and had the right to grant it at his pleasure or by his authorized officers. (Hob., 332; Co.-Litt. 1, 41*b*; 4 Bac. Abr., Perog., 153; 7 Day's Com. Dig., 76.)

"The authority of the proclamation is in the *right of the king to legislate over a conquered country*, which, as Lord Mansfield says, was never denied or ques-

tioned in parliament." (See 7 Johns. R., 8; 6 Peters, 714; 8 American State Papers, 789, Pubi c Lands.)

Here, then, was the system which prevailed prior to the American Revolution. The whole power was either *legislative* or *prerogative*, but the legislative was *supreme*.

And there was *no treaty power* of sale at all. (1 Am. Archives, vol. 2, pp. 617, 1240; vol. 5, p. 1280; vol. 6, pp. 740 1044, 1588, 1610.)

During the era of the Continental Congress, both it and the colonies claimed the *legislative* power to sell, regardless of Indian occupancy. (Am. Archives, vol. 6, p. 1044; vol. 2, p. 1240; Am. Archives, 5th Series, vol. 1, pp. 213, 1621; vol. 2, p. 1363; vol. 3, pp. 54, 210; vol. 3, pp. 134, 178, 788; 9 Peters, 746.)

The late Commissioner of the General Land Office says:

"The old Continental Congress (Congress of Confederacy) spent a year in the consideration of 'an ordinance for ascertaining the mode of locating and disposing of lands in the western territory,' and within three years passed an amendatory ordinance greatly modifying the provisions of the original." (Rep. Com. General Land Office, 1868, p. 96.)

There was no treaty power, separate from the legislative power, under the Continental Congress or the Congress under the Articles of Confederation. (9 Peters, 746.)

The Congress of the confederacy undertook to dispose of lands, (Swan's Ohio Land Laws 3, &c.,) and passed the ordinance of July 13, 1787, to establish a territorial government. This was unauthorized. (19 Howard, 608.) And because it was, the Constitution afterward gave the exclusive legislative power to Congress to establish territorial governments and dispose of the public lands.

The States never undertook by *treaty* to sell the public lands, though prior to the adoption of the Constitution they exercised the *legislative power* to grant them to the soldiers of the Revolution, (Swan's Ohio Land Laws, 111; Henning's Va. Stat., vol. 10, pp. 23, 51,) and to cede them to the national Government, (19 Howard, 605,) and Congress accepted the cessions.

Some of the cessions were made after the Constitution was adopted.

The States, by deeds of cession made in pursuance of *acts of the State legislatures*, ceded the public lands to the United States, as follows:

Virginia, March 1, 1784, (1 L. U. S., 472; Swan, 125;) Massachusetts, in 1785; South Carolina, 1787; Connecticut, May 30, 1800, (1 L. U. S., 485; Swan's Ohio L. L., 80;) Georgia, in 1802, &c.

All the treaties by which lands have been since acquired grant them to the *United States*.

During the Revolution, and until the States ceded the lands to the national Government, the States had over the lands—

"The transcendant powers of Parliament, as well as of the executive department. (*Cherokee Nation* v. *Georgia*, 5 Peters, 47.)"

What was this power? It was the exclusive power to limit the *prerogative* of the crown to sell, and the still higher supreme legislative power to sell.

The cession of the public lands by the States commenced before the adoption of the Constitution. When the Constitution was made, the people gave to the new Government as full and ample power as the States had—"the transcendent power of Parliament"—over the public lands in these words:

"The Congress shall have power to dispose of and make *all* needful rules and regulations respecting the territory or other property belonging to the United States."

If, then, this did not confer power as ample as that by which Parliament restrained the prerogative power of sale, and could have restrained a treaty power if any had ever been asserted, then I know of no words capable of clothing Congress with such power.

If this power be not *supreme* as to the public lands, then the Constitution should have read—

"The Congress shall have power to dispose of the public lands, unless in case he President and Senate, by treaty with savages, shall otherwise determine."

The argument drawn from the nature of the legislative power.

The men who made the Constitution did it with a knowledge that the *legislative* power on any subject had always been regarded as *supreme*.

Blackstone says, every law is "prescribed by the *supreme* power of the State;" Paschal says, "it includes *supremacy*." (Annotated Const., 248; 1 Blackstone, 44; 1 Kent, 447; Story's Const., 1738; Federalist, Nos. 33, 64; 9 Wheat., 210; 4 Wheat., 406.) And it results from the division of government into three separate independent departments of legislative, executive, and judicial.

Legislative supremacy proved by the Constitution.

The Constitution fixes the order of supremacy for it—for acts of Congress, treaties, and State constitutions and laws.

Paschal says:

"The national rule of action, then, is: 1. The Constitution; 2. Acts of Congress; 3. Treaties; 4. The judicial decisions and precedents. The State constitutions, laws and decisions on, are subordinate to these. (Annotated Const., 249; *Ableman* v. *Booth*, 21 How., 525; Story's Const., 1836; Fed., No. 33; 9 Wheat. 210; 4 Wheat, 405; Letter of Congress, 13th April, 1787; 12 Journal Cong., 32, 36; 1 Wirt's State Papers, 45, 47, 71, 81, 145; Sergt.'s Const, ch. 21, pp. 212–219; ch. 34, p. 406; 3 Dallas, 220–277; Journal of Convention, 222, 282, 293; Fed., Nos. 44, 64; Journal H. Reps., 6 April, 1796; Marshall's Wash., 650; 4 Elliot's Deb., 244, 248.)

Judge Curtis, in his exhaustive opinion in the *Dred Scott* case, has proved that the power which the Constitution gives to Congress to dispose of the public lands extends to lands *then* or *thereafter* acquired by the nation, (19 Howard, 611,) and that the power of Congress is *exclusive*. He says:

"The Constitution declares that Congress shall have power to make '*all* needful rules and regulations respecting the territory belonging to the United States. (19 Howard, 615.) * * The subject-matter is the territory of the United States *out of the limits of every State*, and consequently under the *exclusive* power of the people of the United States, [that is, of Congress.] Their will respecting it, manifested in the Constitution, can be *subject to no restriction*. * * Where the Constitution has said *all* needful rules and regulations, I must find something more than theoretical reasoning to induce me to say it did not mean all."

And he proceeds to show that the power which Congress has to dispose of the public lands is *all* the power there is upon the subject, and is "closely analagous" to that *exclusive* power which Congress has to legislate for the District of Columbia, and that it is similar to the *exclusive* power which Congress has to "regulate commerce," &c.

But he considered the treaty power in the same connection, and held, that the Louisiana treaty could not restrain the power of Congress over the public lands. He says:

"But that a treaty with a foreign nation can deprive the Congress of *any part of the legislative power* conferred by the people, so that it can no longer legislate, as it was empowered by the Constitution to do, I more than doubt. * * No supremacy is assigned to treaties over acts of Congress. * * Such a stipulation in a treaty, to legislate or not to legislate in a particular way, has been repeatedly held in this court to address itself to the political or the legislative power, *by whose action thereon the Court is bound.*"

This is the same position so clearly proved in the debates of 1816 on the commercial treaty, to which I have already referred, and to which I again ask attention. In the debates of 1816 it was conceded that there could not be two supreme powers on the same subject. (Annals, Jan. 17, p. 49.) And I think it is safe to say no jurist or statesman ever so claimed.

It is not to be supposed the framers of the Constitution left this great subject of the public lands in a condition where Congress and the treaty power could, day after day, each repeal the other, and thus make the struggle only a *question of time.* This is supremely absurd. One or the other must be *inherently supreme;* for, as Chief Justice Marshall has said—

"Where this repugnancy exists, (a power to destroy, wielded by a different and hostile hand,) that authority which is *supreme* must control."

In the debate of March, 1796, Mr. Madison, in referring to the idea of supremacy based on the order of time, said:

"That it involved the absurdity of an *imperium in imperio*, of two powers, both of them supreme, yet each of them liable to be superseded by the other." (Annals, p. 489.)

If these two powers be in that anomalous condition, it not only imputes a want of foresight in the framers of the Constitution, but it is the *only* case where they permitted any such thing to exist.

The fact is the sale of lands had always been *legislative* or *prerogative*, and never had been claimed as a matter for treaty jurisdiction. The Constitution abolished the prerogative power, showing thereby a purpose to make it *exclusively* legislative.

And with this avowed purpose to annihilate prerogative power, it is not reasonable to suppose that the Constitution was designed to enlarge the treaty power. The Constitution did declare a treaty a *law to the State courts*, but it *did not enlarge the subjects of treaty jurisdiction*; it did not enlarge the orbit in which the treaty power revolves. Those who have sought to enlarge it have done so upon the *mistaken idea that*,

if a treaty was a law, its jurisdiction extended as such to any subject forced within its range. But this would enable it to swallow up every legislative power. And if a treaty is to be held a law, and a new treaty jurisdiction given, never before known, it must of necessity be held as only a concurrent power, and the legislative power be declared *supreme.*

If, while the exercise of the power lay dormant, there could be a *concurrent* power by treaty, in the end one or the other must be *supreme.* The ultimate question is not a *power of repeal,* but a *question of supremacy.*

In that class of cases where there is a *concurrent* power over subjects by the national Government and the States, the power of Congress is *supreme.*

And the cases on this subject determine the principle that, in the very nature of things, there cannot be two powers, each having capacity to supersede the other.

In *Gibbons* v. *Ogden,* 9 Wheaton 1, Chief Justice Marshall said:

"The sole question is, can a State regulate commerce with foreign nations and among the States, *while Congress is regulating it?*"

And here we may inquire, can a treaty regulate the sale of the public lands after Congress has regulated it? (See 5 Howard, 504; 7 Howard, 283; 3 Wallace, 713; 11 Peters, 142.)

THE AUTHORITIES PROVE LEGISLATIVE SUPREMACY.

The legislative power to sell lands is expressly delegated to Congress; it is not to the treaty power, and the will of Con- is therefore supreme. Its supremacy is essential to its preservation and existence; it is not so essential to the treaty power. It may survive for all purposes over which its power is exclusive, and the just balance of each department of the Government be preserved.

The authority of Justice Story sustains this view. He says:

"A power [as, for instance, to make treaties] given by the Constitution cannot be construed to authorize a destruction of other powers, [as, for instance, to dispose of lands,] given in the same instrument. It must be construed, therefore, in *subordination to it,* and cannot supersede or interfere with any other of its fundamental provisions. Each is equally obligatory and of paramount authority within its scope, and no one embraces a right to annihilate any other."

This view is conclusively presented by Mr. Gallatin in the debates of March, 1796:

"Unless it is allowed that the *special powers granted to Congress* limit the general power of treaty making, there are no bounds to it; it must absorb all others, repeal all laws in contravention to it, and act without control." (1 Benton's Abr., 644–646)

All the public lands were, and most of them yet are, in Indian occupancy. If the treaty power could supremely arrogate to itself the power to sell all, then why was the provision inserted in the Constitution that Congress should have power to dispose of lands? It is practically blotted from the Constitution.

In *Foster* v. *Neilson*, 2 Peters, 307, the Supreme Court held a *prior act* of Congress *supreme* over a subsequent treaty.

Chief Justice Marshall says:

"The Judiciary is not that department of the Government to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous.

"We think, then, however individual judges might construe the treaty of Ildefonso, it is the province of the court to *conform its decisions to the will of the legislature, if that will has been clearly expressed.*"

In the case of the Kansas Indians, the Supreme Court say, as to the Shawnee Indians:

"If under the *control* of Congress from necessity, there can be no divided authority." (5 Wallace, 755.)

The power to dispose of the public lands is expressly *delegated* to Congress. Such power, in case of any other concurrent authority, is necessarily *supreme*. Many of the authorities which prove this have already been cited.

Mr. Gallatin, in the debate of 1796, in discussing the treaty power, said:

"It must embrace everything, and all the objects of legislation, if not *limited by existing laws*, or if it [a treaty] repeals the laws that clash with it, or if the legislature is obliged to repeal the laws so clashing, then the legislative power, in fact, resides in the President and Senate, and they can, by employing an Indian tribe, pass any law under the color of treaty."

Story, in his work on the Constitution, vol. 1, p. 312, says:

Every power given to Congress is by the Constitution necessarily *supreme*.

And again, p. 374:

"Laws may check and restrain and bound its [executive authority] exercise. * * * The legislative power, except in the few cases of constitutional prohibition, is *unlimited*. * * * *It disposes of all its* [the public] *property*."

Hamilton denied that a delegated power could *infraterritorially* be interfered with by a treaty. He said:

"A treaty, for example, *cannot transfer the legislative power to the executive department*, nor the power of the last department to the judiciary; in other words, it cannot stipulate that the President, and not Congress, shall make laws for the United States; that the judges, and not the President, shall command the national forces."

He then makes another exception, and proceeds to affirm the supremacy of all legislative powers *infraterritorially*. He says:

"Though Congress is authorized to establish a uniform rule of naturalization, yet this contemplates only the ordinary cases of *internal administration*. In particular and extraordinary cases, those in which the *pretensions of a foreign government are to be managed*, a treaty may also confer the rights and privileges of citizens. THUS, THE ABSOLUTE CESSION AND PLENARY DOMAIN *of a province*, or district *possessed by our arms in war, may be accepted by the treaty of peace, on the condition that its inhabitants shall, in their* persons and property, enjoy the privileges of citizens."

It is worthy of especial notice, that no jurist or statesman (so far as I have been able to discover) ever claimed that the treaty power is supreme over a delegated legislative power. In all the discussions it has been admitted that it was *not* so. In the debate of 1816, this was compactly stated thus:

"For the purpose of *internal legislation*, no doubt, *all* legislative powers are vested in them, [Congress,] in *exclusion* to the other departments of the Government. (Annals of January, p. 82.)

This is a claim of *exclusive* power. And see *Scott* v. *Sanford*, 19 Howard, in which Curtis, J., says, "*all*" means *all;* and, as to the disposition of the lands, no member of the court controverted this. (2 Story's Const., 3d ed., p. 213.) And again it was said, in the debate in Congress in 1816:

"When a treaty relates to *such subjects* only as are *clearly* embraced by the treaty-making power, and does not affect those *expressly placed under the legislative department*, it becomes, when duly ratified, a law of the United States, and may be executed by the proper tribunals, without the aid of legislative enactment; but in *all other cases*, as where it relates to *any subject* placed under the peculiar *direction of Congress*, or which lies more properly within the sphere of legislative power, or so far as it relates to any such subjects, *it does not become a law* or *go into effect* without *legislative aid*, and can be considered in the nature of a *compact only*, pledging the national faith that requisite legislative acts will be passed for carrying its provisions into effect." (Annals, January, 1816, p. 84.)

And in the same debate it was maintained that it was because such treaties might be made that the Constitution gave Congress power—

"To make all laws which shall be necessary and proper for carrying into ex-

ecution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or *in any department* or officer thereof."

Paschal says:

"All such laws made by the General Government upon the rights, duties, and subjects *specially enumerated* and confided to their jurisdiction, are necessarily exclusive and *supreme*, as well by express provisions as by necessary implication." (Sim's Case, 7 Cush., 729; Annotated Const., 248; *Houston* v. *Moore*, 5 Wheat., 1–22; 16 Pet., 608; Story on Const., 3d ed., 615)

Opinions of Attorneys General.

From a report in Congress already referred to I quote:

Attorney General Legare, in the case of certain "Missouri land claims," (Op., vol. 3, p. 721,) held, that though a treaty with France had stipulated that certain individuals were to receive from the United States titles to parcels of the territory ceded by that treaty to the United States, still Congress had the power to refuse such titles, and that the executive branch of the Government was—

"Bound by the will of Congress in the premises."

Case of Maison-Rouge grant, (Op., vol. 3, p. 737,) Mr. Legare, Attorney General, Congress having refused to confirm certain claims guaranteed by treaty with France, said:

"The legislature, for reasons satisfactory to itself, and according to principles which I had the honor to develop more fully in a recent communication to you on the subject of the Missouri land titles, chose to acknowledge those claims only *sub modo;* and, to a limited extent. *Its will is our law.*"

Clifford, Attorney General, (Op., vol. 4, p. 696,) said:

"Congress has the exclusive power * * to dispose of * * the territory * * * * belonging to the United States."

Attorney General Mason (Op., vol. 4, 487) said:

"This power has been universally exercised by Congress. The sale of the public lands * * has been in all cases directed and regulated by law."

Attorney General Black, (Op., vol. 10, 361,) in discussing the power of Congress to sell the public lands, said:

"Under our system this extreme power resides *only in Congress.*"

The argument noscitur a sociis.

The supremacy of legislative power is proved by the position which the grant of power as to the public lands occupies in the Constitution.

The Constitution declares that—

"The Congress *shall have power* to dispose of the territory or other property of the United States."

It also says:

"The Congress shall have power to levy and collect taxes." &c.

Then follows an enumeration of eighteen specific delegated powers, including the power to declare war, provide a navy, &c.

Here are more than twenty different legislative powers. On these subjects the Constitution says, that "*all* legislative power is vested in Congress." No one of them infraterritorially has ever been claimed as belonging to the treaty-making power, or within its supreme jurisdiction.

If the treaty power can supremely usurp one, it may equally usurp all. All are conferred by the same expression, "the Congress shall have power—all power," as declared when defining the extent of the power.

Can the treaty power "declare war," "provide a navy," "coin money?" These are powers delegated to Congress, and, because so delegated, are *exclusive* powers, even though some of them relate to or affect intercourse with foreign nations. And so must be the power to sell lands at least supreme. The maxim applies "*noscitur a sociis.*"

The power to regulate commerce is not only *supreme*, but *exclusive*. (Paschal's Annotated Const., citing Story's Const., §§ 1061, 1072; *Gibbons* v. *Ogden*, 9 Wheat., 196, 209; *Passenger Cases*, 7 How., 283; see 5 How., 504.) The power to legislate on fugitive slaves was held to be an *exclusive* power. (*Prigg* v. *Pennsylvania*, 16 Pet., 539; 2 Paine, 348; 2 McLean, 612; 2 Wheat. Cr. Cases, 594.)

And it may be remarked here that the same clause which gives the power to dispose of the public lands confers the authority to establish territorial governments, which is conceded in *Scott* v. *Sanford*, 19 How., 448, and affirmed in many previous cases. (5 Pet., 44; *Am. Ins. Co.* v. *Canter*, 1 Pet., 512.) Now, if the power to "dispose of the public lands" does not give a *supreme* power to Congress on that subject, then the power founded on the same clause to establish territorial governments is not supremely in Congress, and the

treaty power can establish such governments *infraterritorially*, and determine how long they shall continue. These are some of the results which are to follow, unless the power of Congress is supreme.

The section also gives the power to admit *new States*. Can they be admitted by an Indian treaty?

The argument from the power over Territories.

When the act of July 22, 1854, was passed, making the Cherokee neutral lands liable to pre-emption entries, Kansas was a *Territory*. Whatever power or efficacy the act then had, it continues to have. By the Constitution, Congress is just as omnipotent as to the public lands as the British Parliament is as to crown lands.

This is especially so as to the Territories. It has been urged frequently that, as to them, Congress is omnipotent *in all respects*, and that none of the restraints of the Constitution apply there, and certainly not even the modifying power of infraterritorial Indian treaties. See App'x Cong. Globe, vol. 20, pages 270, 273, 274; 2 Benton's Thirty Years' View, 729, 731; 2 Stat., 245, sec. 2.)

In 1 Peters, 511, it was said that—

"In legislating for them [the Territories] Congress exercises the combined powers of the General and of a State Government."

In *United States* v. *Gratiot*, (14 Peters, 52,) the power of Congress was said to be "without limitation." (See *U. S.* v. *Rogers*, 4 Howard, 567; 19 Howard, 393.)

Story says the power is—

"Clear, exclusive, and universal, and their legislation is subject to no control, but is absolute and unlimited, unless so far as it is affected by stipulations in the cessions, or by the ordinance of 1787." (2 Const., § 1328, 2d ed.)

Kent says of the Territories:

"Congress has assumed to exercise over them *supreme* powers of sovereignty; *exclusive* and unlimited power of legislation is given to Congress by the Constitution and sanctioned by judicial decision." (1 Kent, 383; Rawle on Const., c. 27, p. 237.)

The argument from the construction by Congress.

And now, if this question be doubtful, let us bear in mind that this court has said that "a practical construction of the

Constitution by Congress is entitled to great consideration, and should be followed in all cases of doubt." (8 Wallace, 544.) If a question can be settled by legislative construction, this one is.

Congress has decided this by enacting thirteen different laws to authorize Indian treaties, commencing with the foundation of the Government, August 20, 1789, (1 Stat., 54,) running through our whole history, and closing with an act to prohibit them all, March 3, 1871. In many of these acts the particular provisions to be inserted in treaties are specially designated.

While this was being done, more than two dozen acts have been passed to carry into effect treaty agreements, or to validate what treaties attempted to do in excess of treaty-power, or to give officers authority to do what treaties could not authorize them to do. And, besides all these, acts to appropriate money to carry out treaty agreements have been passed in great numbers, or such appropriations have been withheld at discretion.

And I may repeat, as appropriate here, that on the 9th of January, 1817, Governor Morrow made a report in the United States Senate, in which he said, in relation to Indian treaties and public lands:

"The grant of power to make treaties is undefined by the Constitution, which has been considered to extend to all subjects, proper for a treaty regulation, with other independent States, *except the cases in which the special grant of power to other branches of the Government may operate as a restriction to its exercise.*"

He then says that a former Congress, regarding the grant of power to Congress "to dispose of the public lands" as a *limitation on the treaty-making power*, expressly, by the act of March 26, 1804, authorized the President to stipulate with the Indians for an exchange of lands. (Am. State Papers, Indian Affairs, vol. 2, pp. 222, 410.)

The opinion of Congress was expressed in the resolution of April 7, 1796, reaffirmed in March, 1871, declaring:

"That when a treaty stipulated regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution as to such stipulations on a law to be passed by Congress."

It is affirmed in the legislation in reference to commerce and extradition and various other treaties.

The opinion of the popular branch of Congress is proved by a unanimous vote June 1, 1868, and again June 18, 1868, and by the vote of July 27, 1868, in relation to the Osage lands. It is proved by the action of the House, July 13, 1868, and April 5, 1869, denying the validity of the sale made under the Cherokee treaty to James F. Joy. (House Rep. 12, 3d Sess. 41st Congress, p. 21; see 13 Peters, 450, 517; 14 Peters, 437; 15 Peters, 421; 9 Wallace, 197; 1 Black, 549, 555; 1 Story on Const., 312, 374; *United States* v. *Ferreira*, 21 Howard, 40; *United States* v. *Todd*, 13 Howard, 52. *)

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* I quote House proceedings as follows:

PROCEEDINGS IN THE HOUSE.

JUNE 1, 1868.

By Mr. JULIAN:

Whereas the Indian tribes of the United States have no power by treaty to dispose of their lands, except the power of cession to the United States; and whereas a treaty is now being negotiated between the Great and Little Osage Indians and a special Indian commission acting on the part of the United States, by which 8,000,000 acres of land belonging to those Indians are to be transferred to the Leavenworth, Lawrence, and Galveston Railroad Company, in contravention of the laws and policy of the United States affecting the public domain; therefore,

Resolved, That the President of the United States be requested to inform this House by what authority and for what reason the said lands are to be disposed of, as above recited, and not ceded to the United States, and made subject to their disposition.

Passed unanimously.

In reference to the same treaty then pending before the Senate Committee on Indian Affairs, June 18, 1868, the following resolution was offered by Mr. Clarke, of Kansas:

Resolved, (as the sense of this House,) That the objects, terms, conditions, and stipulations of the aforesaid pretended treaty are not within the treaty-making power, nor are they authorized either by the Constitution or laws of the United States; and therefore this House does hereby solemnly condemn the same, and does also earnestly, but respectfully, express the hope and expectation that the Senate will not ratify the said pretended treaty.

Passed unanimously.

June 27, 1868.—By Mr. Julian, resolution denying the right of treaty-making power to dispose of Indian lands. Passed.

Joint resolution (H. R. 286) relative to the lands of the Cherokee and Great and Little Osage Indians:

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be, and he is hereby, directed to withhold the issuing of patents to the purchasers of lands heretofore sold, or which may hereafter be sold, under and by virtue of the treaty between the United States and the Cherokee Indians, concluded on

The opinion of Congress is proved by the fact that under

the nineteenth day of July, in the year eighteen hundred and sixty-six, and the treaty between the United States and the Great and Little Osage Indians, concluded on the twenty-ninth day of September, in the year eighteen hundred and sixty-five, or under any Indian treaty which may hereafter be concluded, until otherwise provided for by law.

Passed the House of Representatives June 3, 1868.

Attest: EDWARD MCPHERSON, *Clerk.*

[H. R. 335.]

JOINT RESOLUTION for the protection of settlers on the Cherokee neutral lands in Kansas.

Whereas in the treaty between the United States and the Cherokee nation of Indians, made July nineteenth, eighteen hundred and sixty-six, proclaimed August eleventh, eighteen hundred and sixty-six, there is a provision purporting to authorize a sale by the Secretary of the Interior of the Cherokee neutral lands in Kansas, but which reserves from sale lands having improvements of the value of fifty dollars not being mineral, and occupied by any person for agricultural purposes, and which gives to occupants the right to purchase one hundred and sixty acres of each of said lands, under and by virtue of which about eight hundred families are provided for; and whereas, between August eleventh, eighteen hundred and sixty-six, and June sixth, eighteen hundred and sixty-eight, about two thousand seven hundred additional families have settled on said Cherokee neutral lands, each family occupying one hundred and sixty acres, on which improvements have been made at an average cost of about five hundred and ten dollars, besides expenditures for living of four hundred and fifty dollars for each family, said settlements and improvements being made without objection from any source, and on the faith that the settlers would be protected in the right to acquire title to said lands as other settlers on public lands; and whereas, on the thirtieth day of August, eighteen hundred and sixty-six, a contract was made by and between James Harlan, Secretary of the Interior, and the American Emigrant Company for the sale of certain portions of said lands, which contract has been assigned by said company to James F. Joy, said contract and assignment being on file in the Department of the Interior; and whereas a supplementary treaty between the United States and said Cherokee nation was made April twenty-seventh, eighteen hundred and sixty-eight, ratified June sixth, and proclaimed June tenth, eighteen hundred and sixty-eight, all without any knowledge thereof by any of the persons occupying said lands, and which ratifies said contract with the American Emigrant Company, and the assignment thereof to said Joy, with certain modifications provided in said supplemental treaty, but which makes no provision for the protection of the persons or families who have settled upon and improved said lands, but purports to ratify a sale of said lands, including the improvements thereon; therefore,

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where any person, prior to June tenth, eighteen hundred and sixty-eight shall have settled on any tract of land of one hundred and sixty acres, or less, in the body of lands known as the Cherokee neutral lands, and shall have made improvements thereon of the value of fifty dollars, and occupied such tract for agricultural purposes, such person, his heirs or assigns, so occupying any such tract of land, shall, after due proof made in such manner as may be prescribed by the Secretary of the Interior, be entitled to enter and receive a patent for the lands so occupied, on paying one dollar and twenty-five cents an acre within one year, in such manner as the Secretary of the Interior may prescribe; and the money so to be paid for said lands shall be paid over to said Cherokee Indians.

Passed the House of Representatives July 13, 1868.

Attest: EDWARD MCPHERSON, *Clerk.*

the act of July 15, 1870, (16 Stat., 362, sec. 12,) in direct conflict with the XVIIth article of the Osage treaty of 1865, the Osages have been removed and their lands are now being sold.

In 1831 the Secretary of War, to whom was intrusted the execution of the act of March 28, 1830, made a report to Congress, and he insisted that—

"In none of our treaties with the Indian tribes is there any guaranty of political rights *incompatible with the exercise of the power of legislation.* * * For, if there were, *the legislative power of Congress* * * *would be annihilated*, and the treaties alone would regulate the intercourse between the parties."

Part IV, Schoolcraft's Indian History, 439, citing Indian Con. Docs., vol. VI, Doc. 2, p. 27.

The title under the treaty.

Among the grounds which I have heard suggested, in reply to all this, and in support of the title under the treaty are these:

I. That the treaty repealed the acts of 1854 and 1862 as to these lands.

II. That similar titles have been sustained by the courts and Attorneys General.

[H. R. 73.]

JOINT RESOLUTION relative to the Cherokee neutral lands in the State of Kansas, and the late treaties respecting the same.

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of the treaties between the United States and the Cherokee nation of Indians, proclaimed August eleventh, eighteen hundred and sixty-six, and June tenth, eighteen hundred and sixty-eight, as profess to authorize the lands described in the seventeenth article of said first-mentioned treaty, and all contracts and grants purporting to be made thereunder, be, and are hereby, annulled and declared void; and said lands shall be, and are hereby, made subject to settlement, entry, and sale at one dollar and twenty-five cents per acre, under the laws of the United States regulating pre-emptions, which laws are hereby extended over and made applicable to said lands; and the proceeds of the sales of said lands shall be, from time to time, paid over to said nation of Indians, until the sum paid shall be equal to one dollar and twenty-five cents per acre for all said lands; and the Secretary of the Treasury shall refund all moneys paid to the United States under any sale made by virtue of said treaty: *Provided*, That the purchasers of said lands shall pay the fees and expenses of their several purchases from the Government as required of other pre-emptors: *And provided further*, That when *bona fide* settlers are found on the sixteenth and thirty-sixth sections of said lands, the same shall not be reserved for school purposes, but other lands of like amount in said tract, as contiguous thereto, as may be not occupied by settlers, shall be substituted therefor, and designated by the State of Kansas.

Passed the House of Representatives April 5, 1869.

Attest: EDWARD MCPHERSON, *Clerk.*

III. That so many interests are involved in treaty titles that public policy requires they should not be disturbed.

IV. That the Cherokees had a fee simple title which they could convey by treaty.

V. That the Cherokee treaty was authorized by law.

And to these propositions I proceed to reply—

I.

An Indian treaty cannot repeal an act of Congress disposing of the public lands.

In reply to this, it may be said that the Cherokee treaty is a law, and operates as a repeal of the acts of 1854 and 1862. If this were possible, it does not relieve the treaty of the difficulties which it and the patents now relied on as evidence of title encounter.

But the treaty cannot repeal the acts referred to.

It is sometimes said in general terms that an act of Congress can repeal a treaty.

It is, perhaps, more accurate to say that the Government may, by act of Congress, declare that it *will not comply with international treaty stipulations*, and by repealing the treaties, or the acts which authorize their execution, the authority of officers for that purpose is withdrawn, and for all purposes the determination of the law-making power is a *political question*, and that *courts are bound to accept the law of the political departments of the Government*, rather than the international branch of the national power.

And if a treaty can be in "law and equity" cases, a "municipal law" *to the courts*, an act of Congress may repeal and *amend such* municipal law.

And as to Indian treaties, the Indian tribes and the lands they occupy having always been and in all things *subject* to the power of Congress, treaties with them may be repealed and annulled by Congress at pleasure.

These are the doctrines which seem to be in accordance with the theory of our Government, the practice of Congress, and the rulings of the courts.

Congress has passed many such acts, and the courts yield

"*to the will of the legislature*" always. (Act July 17, 1798, 1 Stat., 578; 2 Curtis, 460; 3 Opinions Attorneys General, 737; act March 26, 1804; *Foster* v. *Neilson*, 2 Peters, 303, 307; joint resolution April 10, 1869, 16 Stat., 55; Osage treaty, 1865, 14 Stat., 687; act July 15, 1870, sec. 12, 17 Stat., 362; same treaty, articles I, II, and XVII, act February 21, 1863, 12 Stat., 658, 1101; act February 16, 1863, 12 Stat., 652; act January 29, 1861, erected State of Kansas, article V; Cherokee treaty, December, 1835, and other treaties; *Boudinot's Case*, 11 Wallace; *Taylor* v. *Morton*, 2 Curtis, 458; *The Clinton Bridge*, 1 Walworth, 155; *Mitchell* v. *United States*, 9 Peters, 712; act June 30, 1834, 4 Stat., 729; act March 30, 1802, 2 Stat., 141; act February 20, 1863, 12 Stat., 652; *Webster* v. *Reid*, 1 Morris, Iowa, 467.)

And if *courts* are bound to accept the law of the political departments rather than the law of treaties, why are not executive officers equally bound?

In *Foster* v. *Nielson*, 2 Peters, 307, the court enforced an act of Congress against a subsequent treaty, and said:

"If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous.

"We think, then, however individual judges might construe the treaty of Ildefonso, it is the province of the court to *conform its decisions to the will of the legislature, if that will has been clearly expressed.*

In *Taylor* v. *Morton*, 2 Curtis, 454, the learned judge said:

"Though a treaty is a law of the land, under the Constitution of the United States, Congress may repeal it, *so far as it is a municipal law, provided its subject-matter is within the legislative power of Congress.*"

The *reason* of this is, that on a *legislative subject* the *power of Congress is supreme*, and the court must "conform its decisions to the will of the legislature."

From this it follows that it matters not *when* the supreme power has declared its will; before or after the exercise of the hostile power the supreme must prevail; not in the order of time, but in the order of power.

And it would follow from the opinion of Judge Curtis that if, under an *international treaty*, there can be vested individual rights at law or in equity as to a subject-matter purely international, and not municipal or *infraterritorial*, the courts would enforce it, even possibly as against an act of Congress.

And if this be so, it must be because the treaty power is supreme on international subjects, and the legislative power is supreme on infraterritorial or municipal subjects. This accords with reason and reconciles all difficulties.

There is not and cannot be a general and unlimited treaty power to repeal all acts of Congress upon all or any legislative municipal subjects.

That would be a power to destroy all municipal legislation. It is monstrous to suppose that the Constitution has within it such an element of destruction. The men who made it introduced no such Trojan horse within our walls, and it behooves every judge to say:

"*Timeo Danaos, et dona ferentes.*"

(See 1 Writings of Madison, 524.)

The courts have held no such doctrine.

In the Boudinot case, 11 Black, it is said, in general terms:

"A treaty *may* supersede a prior act of Congress, and an act of Congress *may* supersede a prior treaty; citing *Taylor* v. *Morton*, 2 Curtis C. C. R., 454; 2 Peters, 314; *The Clinton Bridge*, 1 Walworth, 155."

It will be observed this authority does not say that a later treaty *does* repeal *all* prior inconsistent acts of Congress, nor that a later act of Congress always does repeal a prior treaty. Reason and authority unite in proving that a treaty can *never* repeal a prior act of Congress on a *subject within* the *legislative cognizance*, and that the courts must *always* execute the acts of Congress, regardless of treaties, even on subjects of treaty cognizance; though possibly a treaty *operative in itself* as to a subject not within the legislative jurisdiction might be enforced, if such a case could arise. The Supreme Court, by citing *Taylor* v. *Morton*, seem to sanction the *limited* power of repeal announced in that case. And such a treaty, on a subject-matter within the concurrent treaty and legislative power, might be enforced in the courts by parties therein, possibly when the legislative power had not been exercised.

The Boudinot case involved *only* the question whether the internal revenue act of Congress was supreme over the prior treaty exemption from tax in favor of certain Indians, and the court held that the act of Congress was supreme; was the

law to the court; and this is all the absolute law on this subject decided by the case. The question did not arise whether a treaty could repeal a municipal law.

In *Foster* v. *Neilson*, 2 Peters, 303, the petitioner claimed land granted by the King of Spain, January 2, 1804, in West Florida, which it was alleged was confirmed by the treaty between the United States and Spain of February 22, 1819. For the defense it was claimed that, prior to said grant of 1804, that part of Florida had been ceded by Spain to France, and by France to the United States by treaty of 1803. It was a controverted question from 1803 to 1819 whether the United States or Spain owned it. Our Government claimed it was ours, and acts of Congress so recognized it. The act of 26th March, 1804, annulled grants claimed under Spain. (2 Pet., 303.)

The contest was a *disputed boundary question between the the United States and Spain.*

The court say:

"In a controversy between two nations, *concerning national boundary*, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. * * The judiciary is not that department of the government to which the assertion of its interest against *foreign* powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. * * A question like this *respecting the boundaries of nations* is * * more a political than a legal question, and * * the courts of every country must respect the *pronounced will of the legislature.*"

In that case the court *did* respect the *acts of Congress* in opposition to a *later* treaty.

The case did not call for a decision on the question whether an international treaty could repeal an act of Congress. But the court did say:

"The article [of the treaty between Spain and the United States, February 22, 1819,] does not declare that all grants made by His Catholic Majesty before the 24th January, 1818, shall be valid to the same extent as if the ceded territories had remained under his dominion. It does not say that those grants are hereby confirmed. Had such been its language, it would have acted directly on the subject, and would have repealed those acts of Congress which were repugnant to it."

But this said nothing of the treaty power to repeal an act of Congress on an *infraterritorial* subject—a municipal law—enacted in pursuance of an expressly delegated power. It only held that on an *international subject*, on a question of

disputed boundary between nations, a question of the *cession of territory*—a clear subject of international treaty jurisdiction—it was competent for an international treaty to agree where the boundary had been and to permit a foreign nation to determine what titles it had previously granted. Even this power was denied by Madison and others in the Virginia convention. (See debates January 18, 1788, 3 Elliott, 496, 516; also January, 1816.) It has been since denied by our Government. (1 Kent, 167, *n.;* Palmerston to Fox, November 19, 1837.)

The Maine boundary treaty of 1842 was not concluded until commissioners from Massachusetts and Maine assented to it.

But the supremacy of the treaty power on this subject may well be conceded without admitting that an Indian treaty can destroy the legislation of Congress as to the public lands.

As to them the power of Congress is undoubted; the subject is municipal.

As to national boundary the subject is international, and one nation cannot decide it.

This is the distinction contended for by Hamilton, who admitted that the treaty power could not *infraterritorily* interfere with the legislative delegated power to pass naturalization laws, but might, in acquiring foreign territory and citizens, provide for their naturalization. (7 Hamilton's Hist. Repub., 667; *Am. Ins. Co.* v. *Canter*, 1 Peters, 511.)

Congress can declare war. But it is an exclusive and supreme treaty power to make peace with foreign nations. A treaty of peace can repeal or alter, supersede, or render obsolete the act declaring war, but it does not follow that it can go further and interfere with *internal administration*—a subject not international, not of treaty jurisdiction—and repeal the acts establishing the Department of War.

The case of *Ware* v. *Hylton*, 3 Dallas, 199, sustains the same general view I have presented.

The Virginia act of October 20, 1777, sequestered British property, including debts due from citizens of Virginia to British subjects.

Prior to this Hylton, a citizen of Virginia, gave his bond, July 7, 1774, to Jones, of whose estate Ware became administrator. By the IVth article of the treaty of peace of 1783 it was agreed that creditors on either side shall meet with no impediment to the recovery of debts.

The treaty was not made *under the Constitution*, but by virtue of the legislative authority of the Congress under the Articles of Confederation.

After all this the Constitution was made, declaring:

"That all treaties *made*, or which shall be made, * * shall be the supreme law, and the judges in every State shall be bound thereby."

The question was, whether the Virginia act was annulled by the treaty. (See 1 Writings of Madison, 523.) The court held that the legislative power of the Congress of the confederacy was competent to make the treaty, and the *Constitution* was retroactive and expressly ratified this treaty, and so repealed the Virginia law.

Certainly it was competent for the *Constitution* to abolish all preceding State laws. (3 Dallas, 199.) No question was decided as to the power of a treaty *under the Constitution*. But it does not follow that, if a *treaty of peace* can abolish *State laws*, it can abolish *all acts of Congress*—certainly not those which *relate to internal administration*, enacted in pursuance of *express* authority. (See *Hamilton* v. *Eaton*, Martin, North Carolina C., 79.)

There is a wide difference between the supremacy of a treaty on a treaty subject over a *State* law, and its supremacy over an act of Congress.

An *international treaty* may operate as a law to the courts, regulating the reciprocal rights of property of citizens, the object being international, the means appropriate to secure the object, and not prohibited by an authorized act of Congress. (*Hopkirk* v. *Bell*, 3 Cranch, 454; *Georgia* v. *Brailsford*, 3 Dallas, 1; *New York* v. *Clark*, 3 Wheat., 1; *Shanks* v. *Dupont*, 3 Pet., 242; *Hughes* v. *Edwards*, 9 Wheat., 489; *Orr* v. *Hodgson*, 4 Wheat., 453; *Dupont ex parte*, 1 Harp. Ch., 5; *McIlvain* v. *Cox*, 4 Cranch, 209; *Fisher* v. *Hamden*, 1 Paine, 55; *U. S.* v. *Schooner Peggy*, 1 Cranch, 103.)

In *Haver* v. *Yaker*, 8 Wallace, 32, the question arose whether a treaty regulating descent in behalf of the subjects of a foreign nation was supreme over *a State law*, (not an act of Congress.) The court did not decide it, by reason of the *time* when the treaty took effect, but that was on a subject *international* in its character, and which was a proper subject of international law.

Madison limited treaty supremacy to cases—

"Within the prerogative of making treaties,"

And he said it—

"No doubt has limits." (1 Mad. Writings, 524.)

It is possible that an international copyright treaty might be a law to the courts; but in 6 Opinions, 291, Attorney General Cushing seemed to concede that there must be an act of Congress to *authorize officers to execute it.*

But this whole question, I submit, is practically settled by the course of the nation as to treaty *appropriations*, *extradition*, *commercial regulations*, &c.

If a commercial treaty cannot repeal a tariff law, how can an Indian treaty repeal an act for the sale of lands?

The authority to repeal an act of Congress is a *legislative power*, and certainly cannot be exercised by treaty, except on a subject recognized by the law of nations as a subject of treaty jurisdiction.

I submit, then, that treaties may, to the courts, *be supreme over subjects purely and exclusively international, equally affecting the rights of independent nations or their subjects or citizens, when the Constitution has not delegated their determination to Congress, and when, in form, operative per se.* But, *as to all subjects over which Congress has a delegated legislative power, which are municipal and infraterritorial in their character, as internal taxation, the disposition of the public lands, the creation of territorial governments, interior naturalization, &c., the legislative power is* SUPREME, *without reference to the* TIME *the legislative will is declared.*

The treaty power may, for international purposes, establish as law to the courts any principle affecting parties litigant,

or employ any means not excluded by act of Congress passed on a subject of legislative jurisdiction.

II.

The authorities do not sustain the titles claimed under this treaty.

THE CASES AND OPINIONS ON INDIAN TREATY TITLES.

The authority of the courts.

I proceed now to consider some of the cases and opinions relied on to sustain Indian treaty titles. But before doing so, I think I am safe in affirming that in no one of them, as in the case now before the court, has a title been set up or relied on as *acquired by treaty in direct opposition to, and in flat defiance of, an act of Congress.*

In no one of them has the question been made or decided, *that executive officers could execute a treaty and convey a title without the authority of an act of Congress.*

That there are titles acquired *by reason of the existence of treaties* is undoubted, but they are cases where *the treaty has been authorized, or its execution provided for, or its stipulations ratified, by act of Congress.*

And this court has never decided the direct question, that an Indian treaty could repeal an act disposing of the public lands, nor even that such treaty, unaided by Congress, could dispose of the public lands, nor that a treaty could impose duties or confer powers on executive officers.

A consideration of cases heretofore relied on to sustain the treaty title here will show they defeat it.

The case of *Turner* v. *Am. Bap. Mis. Un.*, 5 McLean, 344, so far as it proves anything on this subject, proves the *supremacy* of an act of Congress over treaties, if it does not prove that the power of Congress is *exclusive* as to the public lands.

In that case an Indian treaty provided that "the net proceeds of the sale" of a designated tract of 160 acres of land "shall be paid" a certain society.

Judge McLean said:

"Without a law [act of Congress] the President is not authorized to sell the public lands, so that this treaty, though, so far as the Indians were concerned, was the supreme law of the land, yet, as regards the right to the proceeds of the above tract, an act of Congress is required. The treaty in fact appropriates the above tract of 160 acres for a particular purpose, but to effectuate that purpose an act of Congress was passed."

This case does not hold that a treaty can repeal an act of Congress relating to the public lands, nor claim any treaty supremacy over it, nor that an officer, unaided by act of Congress, can execute a treaty.

In *United States* v. *Schooner Peggy*, 1 Cranch, 103, the facts were: On the 24th April, 1800, the schooner, sailing under authority of the French Republic, was captured as prize by a United States armed vessel. She was libelled as prize in the district court of Connecticut, and by the court ordered to be restored. The captors appealed to the circuit court for September, 1800.

On the 21st December, 1801, a treaty with France provided that—

"Property captured and not yet *definitively condemned*, * * before the exchange of ratifications, shall be restored."

In the Supreme Court, Chief Justice Marshall said:

"This vessel is not considered as being '*definitively condemned*,' * * and ought to be restored. * * It is certainly true that the execution of a contract [treaty] between nations is to be demanded from, and in general superintended by, the executive of each nation. * * But yet *where* a treaty *is the law* of the land, *and* as *such* affects the *rights of parties litigating in court, that treaty* as much binds *those rights*, and is as much to be regarded *by the court*, as an act of Congress."

I know that it has been claimed, but not from an authoritative source, that the *principle* here stated applied to an Indian treaty, and gave it the effect as to certain lands to repeal the acts of 1854 and 1862, or rather to withdraw them from the operation of the acts. But Chief Justice Marshall said no such thing. He *did* hold that the *French treaty* was a law *to the court*, because the Constitution says:

"The judicial power shall extend to all *cases* in law and equity arising under * * treaties," &c.

He did hold that this treaty was on a *treaty subject*—an *international subject*—the surrender of a French vessel "not yet definitively condemned."

The treaty *encountered no act of Congress on a legislative subject*, as does the Cherokee treaty. There was no *question of the power of officers to execute it.*

Yet Chief Justice Marshall, with a kind of prescience which feared his language might be employed to assert that *any* treaty on *any* subject can repeal *any* act of Congress, carefully says:

"*Where* a treaty *is the law* of the land, *and* as such *affects the rights of parties litigating, that treaty* * * is to be regarded *by the court.*" (See 1 Writings of Madison, 523.)

Mitchell v. *United States*, 9 Peters, 711. In this case a title to lands in Florida was asserted under deeds made in 1804 from the Creek and Seminole Indians, "*confirmed by the authorities of Spain*," while Florida was subject to Spain.

By the treaty of 1819 Spain ceded Florida to the United States. The acts of Congress of May 23, 1828, &c., authorized a petition to be filed to try the validity of titles. The Supreme Court decided that the treaty and law of nations secured private land owners in their rights to land, (p. 734,) or rather the treaty did *not divest* prior individual rights to land. The question, therefore, was as to the validity of the title. The court held, too, that the fee simple title passed to the purchasers not by the Indian deeds, but by the *prerogative* power and *grant from the Crown.*

The court say:

"Individuals could not purchase Indian lands without permission or license from the crown, colonial governors, or according to the rules prescribed by *colonial laws*, but such purchases were valid with such license or in conformity with the local laws, and by this union of the perpetual right of occupancy with *the ultimate fee which passed from the crown by the license*, the title of the purchaser became complete.

"Grants made by the Indians at public councils have since been made directly to the purchasers, or to the State in which the land lies, in trust for them, or with directions to convey to them, of which there are many instances of large tracts so sold and held, especially in New York. (Indian Treaties, 13–38.)

"It was a universal rule that purchases at Indian treaties, in the presence and with the approbation of the officer under whose direction they were held by the authority of the crown, gave a valid title to the lands; it prevailed under the laws of the States after the Revolution, and yet continues in those where the right to the ultimate fee is owned by the States or their guarantees.

* * * * * * *

"It has been adopted by the United States, and purchases made at treaties *held by their authority* have been always held good by the ratification of the treaty, without any patent from the purchasers of the United States."

This rule of granting lands by an Indian council "prevailed *under the laws of the States.*" Here, then, the *legislative sanction* was required, and this proves the legislative supremacy as to the lands. And in that case the court refers to the *laws of the States*, (p. 746,) showing the character of the Indian tenure—a mere right of occupancy, with no power to sell the fee.

In that case there was no question made as to titles derived under Indian treaties. None was argued; none was decided. Whatever sales were referred to were, doubtless, under treaties authorized by acts of Congress or of State Legislatures.

The case does not hold that an Indian treaty can repeal an act of Congress or impose duties on officers.

Ladiga v. *Roland*, 2 How., 581. In this case the Creek treaty of March 24, 1832, (7 Stat., 366,) was under consideration. The treaty ceded to the United States all the Creek lands east of the Mississippi; and as a *means* of procuring this cession, the United States engaged to allow ninety chiefs to select a section of land each, and every head of a Creek family to select one half-section, which were to be *reserved* from sale for their use for five years, unless sooner disposed of by them. And it was provided that twenty sections should be selected, under the direction of the President, for the orphan children of the Creeks, and divided and retained or sold for their benefit, as the President may direct. And it was provided that the persons selecting lands might convey the same as the President might direct, and that "a title shall be given by the United States on the completion of the payment." And at the end of five years all the Creeks entitled to selections should receive patents in fee simple.

The President, in making selections for the orphans, selected certain lands which had been before that selected and improved by the head of a family, and caused a patent to issue for the lands thus selected for the orphans. The treaty provided that a patent should issue. The head of the family brought an action of trespass against the person holding the

patent title. The court held that the action was well brought. It is said:

"This sale was a direct infraction of the solemn engagements of the United States in the treaty. Though approved by the President, if the plaintiff had previously selected it according to the stipulations of the treaty, *in such case the sale was a nullity* for the want of any power in the treaty to make it. The President could give no such power, or authorize the officers of the Land Office to issue patents on such sales; they are as void as the sales, by reason of their collision with the treaty.

"In our opinion the plaintiff not only has a right to the land in question under the treaty, but one which it protects and guarantees against all the acts which have been done to her prejudice."

Now, as to this treaty, I remark:

1. It was *expressly authorized* by the act of May 28, 1830. (4 Stat., 411.) On a similar treaty the Attorney General held that the act authorized the treaty-making power to make grants of reservations as a *means* of securing the treaty cession. He said, (3 Op., 56:)

"The provisions of the Choctaw treaty (September 27, 1830, 7 Stat., 366,) which secure to persons of that tribe certain reservations of land, were *indispensable parts of the means* to which the United States were obliged to resort (by virtue of the act of May 28, 1830, 4 Stat., 411,) to extinguish the Indian title."

I do not inquire if this opinion was correct. The act was so construed. And this proves not that the treaty power, unaided by statute, can grant any lands, but that *by statute* it could be authorized to do so.

And this treaty of March, 1832, proves the supremacy of the legislative power. While that treaty was held to be authorized by act of Congress, the Cherokee treaty is not.

While the Creek treaty did not, even by virtue of its combined treaty and statutory power, pretend to repeal or interfere with an act of Congress, the Cherokee treaty does.

2. I remark that, although the treaty made by authority of Congress provided that the persons selecting lands might sell them, and that a title should be given to the purchasers by the United States on completion of payment, yet it was deemed necessary to pass an act of Congress to authorize the patents to issue, not only to the purchasers, but to every "*owner*" under the treaty.

The act of July 5, 1838, 5 Stat., 256, provides:

"That the President of the United States be, and he is hereby, authorized and required to cause patents to be issued to such person or persons as may be

the *bona fide* purchaser, owner, assignee, or transferee of any selection or reservation which has been made to or in behalf of any chief or head of an Indian family, under a treaty concluded between the United States and the Creek tribe of Indians at Washington city, on the 24th day of March, 1832, whatever may be the number of immediate transfers or assignments: *Provided*, The person or persons applying for such patent or patents shall adduce satisfactory proof to the Commissioner of the General Land Office of the fairness of said several proceedings, transfers, or assignments."

The whole dealings with the Creeks proves that an Indian treaty cannot, unaided by act of Congress, dispose of lands. The Creek treaty of August, 1814, was executed by the act of March 3, 1837, as I have already shown.

Gaines v. *Nicholson*, 9 How., 356. See 23 How., 457.

By the Cherokee treaty of September 27, 1830, (7 Stat., 333,) the Indians ceded their lands east of the Mississippi to the United States, and took a home west of the Mississippi.

Some of the Indians desired to remain on the lands and become citizens of the States, and *reservations* were made in the treaty for them. The IId article declared that—

"Also one section is allowed to the following persons, to wit: D. W. Wall." &c.

On 27th August, 1832, Wall, the reservee, sold to Gaines, &c.; Gaines brought ejectment against a tenant in possession under trustees of school lands, claiming the land under act of Congress of March 3, 1803, sec. 12, (2 Stat., 229,) for benefit of schools. The trustees filed bill to enjoin the ejectment. The court held:

"Where there are *reservations* in Indian treaties of *specific tracts of land*, which are afterwards found to be the selections set apart for school purposes under a general law, the reservees have the better title. They *hold under the original Indian title* which the United States confirmed in the treaty. But where the reservee claimed under a *float, no specific tract of land* being claimed for him in the treaty, *this court abstains from expressing an opinion*, that being the legal question pending in the court below."

The court said:

"The reservation was so much *carved out of the territory ceded* and remained to the occupant, as he had never parted with it. He holds, strictly speaking, *not under the treaty cession*, but under his *original title*, confirmed by the Government in the act of agreeing to the reservation."

I may say, in relation to this case and this treaty, all that I have said in the case of *Ladiga* v. *Roland*, 2 How., 581, and the treaty there discussed.

This treaty was expressly authorized by act of Congress.

It did not encounter or attempt to repeal any act of Congress.

I have already presented what the President and the Secretary of War said, in 1834 and 1835, of this treaty, and the necessity for *legislation to execute it.* And Congress did legislate for that purpose.

The act of August 23, 1842, (1 Lester, 73,) continued in force prior acts for the appointment of commissioners to adjust claims to reservations. And other acts were passed, as I I have shown, to execute this treaty.

Congress, by these acts, denied the doctrine of the Attorney General, (3 Opin., 56,) that reservations were means authorized by the act of May 28, 1830, (4 Stat., 411,) to secure the treaty.

And in this case the court are very careful to declare that *no fee simple* passed even by the treaty; that the *Indian title merely remained to the reservee* unextinguished.

And still more the court intimate that the treaty can only operate *ex proprio vigore* on a specific *designated tract*, to make a reserve, and consequently that legislation is necessary to execute it as to *floats*; that is, to enable officers to select lands. *U. S.* v. *Brooks*, 10 How., 442.

The Caddo treaty of July 1, 1835, (7 Stat., 470, 472,) ceded the Indian lands in Louisiana, &c., to the United States, and by it reserved lands *described* to the legal representatives of Francois Grappe and their heirs. But the treaty shows that in 1801, the Caddo Indians gave to one Grappe a league of land "*in accordance with the Spanish custom of granting land to individuals.*" This was in the territory then under the jurisdiction of Spain. (*Garcia* v. *Lee*, 12 Peters, 514.) The act of Congress of March 26, 1804, (2 Stat., 289,) expressly confirmed this and similar grants. It declared certain Spanish grants void, but

"*Provided nevertheless*, That anything in this section contained shall *not* be construed to make null and void any *bona fide* grant made agreeably to the laws, usages, and customs of the Spanish Government, to an actual settler on the lands so granted, &c., &c."

The supplemental Caddo treaty of July, 1835, expressly confirmed the right of Grappe and his heirs and assigns for-

ever, "in conformity * * with the original deed." (10 Howard, 450.) The Court decided that the treaty gave a fee simple "*to all the rights which the Caddos had.*" And of course the *act of Congress ratified the real fee* originally conveyed by the *prerogative* power of sale of the Spanish king by his colonial officers. (6 Wallace, 87.)

The court say that the treaty

"Gave to the reservees a fee simple to *all the rights which the Caddos had* in these lands, as fully as any patent from the Government could make one. Nothing further was contemplated by the treaty to perfect the title."

And I may say of this treaty, too, that it was authorized by the act of May 28, 1830, (4 Stat., 411,) and that it did not encounter, or attempt to repeal any prior act of Congress, disposing of the lands. The case proves that an Indian treaty, unaided by act of Congress, cannot dispose of public lands. Nothing passed but "*the rights which the Caddos had.*" It was a case where, as to that right too, the treaty was operative *per se*, requiring no official act.

Fellows v *Blacksmith*, 19 How., 366–372.

By the treaty of 1838 (7 Stat., 550) and 1842, (7 Stat., 586,) the New York Seneca Indians agreed to remove west, and to relinquish their possessions, including the Tonawanda reserve of 12,000 acres, to Ogden and Fellows. This land was originally claimed, both by New York and Massachusetts, but this controversy was settled, and in 1786 Massachusetts, by *legislative act*, ceded the sovereignty and jurisdiction to New York, and New York ceded to Massachusetts the *right of pre-emption and soil*, and this fee-simple title was, by *law of Massachusetts*, vested in Ogden and Fellows, who claimed the Indian *possessory* right under the treaties. The Indians claiming the treaty was not complied with refused to surrender possession. They had been in possession twenty years, and had large improvements. The defendant, having title in fee under Massachusetts, forcibly entered, July 13, 1846, and the plaintiffs, the Indians, sued in trespass *quare clausum fregit*. Their object, doubtless, was to settle the question whether the treaty had been complied with. The court held that "the grantees of the land under the *Massachusetts assign-*

The opinion of Attorney General Butler (3 Op., 56,) was given as to a reservation under the Choctaw treaty of September 27, 1830. (7 Stat., 333.)

But in regard to that treaty, I may say, as I have said of the treaties referred to in *Ladiga* v. *Roland*, 2 Howard, 581, and *Gaines* v. *Nicholson*, 9 Howard, 356, that it was authorized by the act of May 28, 1830. (4 Stat., 411.) It did not encounter or attempt to repeal any act disposing of public lands, and, as I have already shown, there was an act of Congress to execute it. (Act March 3, 1837, 5 Stat., 160.)

The opinion decided nothing as to the inherent power of Indian treaties, but rested on legislative authority, and so conceded legislative supremacy as to the public lands.

The act of March 2, 1819, to enable the people of Alabama Territory to form a State constitution provided that—

"Section 16 in every township, and where such section has been sold, granted, or *disposed of*, other lands equivalent thereto *shall be granted* to the inhabitants of such township, for the use of schools."

The treaty *disposed* of these sections for Indian reservations.

The Attorney General says, the words of the act

"'*Shall be granted*'" do not amount to a *present grant;* on the contrary, the engagement is *executory*. * * It contemplates the contingency of that section (16) being *otherwise disposed of*, and makes provision for such an event."

From all this the clear inference is, that if the act of 1819 *had been designed* to prohibit treaty disposition of section 16, or had absolutely granted them, the act of Congress would have been *supreme*. The opinion put the decision made on a question of *legislative intent*, and necessarily concedes the *legislative power* to dispose of the lands.

The opinion, I will again repeat, says:

"The provisions of the Choctaw treaty (of September 27, 1830, 7 Stat., 336,) which secure to persons of that tribe certain reservations of land, were *indispensable parts of the means to which the United States were obliged to resort* (by virtue of the act of May 28, 1830, 4 Stat., 411,) to extinguish the Indian title."

Here was a *legislative authority* to make the reservations. If the act of May 28, 1830, could thus authorize *that means*, an act could in future provide *against using such means* as do

the acts of July 22, 1854, (10 Stat., 310,) and the act of June 2, 1862, (12 Stat., 413.)

And the Attorney General rests his opinion on the ground that the reservations were an *authorized means*. But even if the Cherokee treaty did not encounter the acts of 1854 and 1862, no one can pretend that the sale *it* attempts to require, was an authorized *means* "to extinguish the Indian title."

The opinion given in 3 Opinions, 365, was on the same treaty. It was both authorized and reservations under it ratified by act of Congress.

In 6 Opinions 291, Attorney General Cushing considered the effect of an international copyright treaty. It is enough to say that the subject was *international*, and it was said that it—

"May *require the enactment of a statute* to regulate the details of a process."

But so far as it proposed to give rights which might arise *in court*, it could, as the Attorney General said:

"Operate as a *law to the courts*. * * It was * * competent and sufficient, *proprio vigore*, to confer a right."

And the Attorney General spoke of the "legal force of the treaty *per se*."

The question was, whether an *international* copyright treaty could give to give subjects of Great Britain copyright, while the act of Congress of February 3, 1831, only gave copyright to "persons being citizens of the United States."

The Attorney General said a treaty was supreme over a *State law*. (*Fairfax* v. *Hunter*, 7 Cranch. 627; *Ware* v. *Hylton*, 3 Dallas, 242; *Gordon* v. *Haliday*, 1 Wash. C. C. R., 291; *Fisher* v. *Hamden*, 1 Paine, C. C. R., 59.) But this is because of the *express provisions of the Constitution*, and does not touch the question whether a treaty can repeal an act of Congress. Upon this subject the Attorney General referred to *Schooner Peggy*, 1 Cranch, 109. But this only related to the individual vested rights of parties in court on an *international* subject, as I have shown, and rests also on express words of the Constitution. It does not touch the question whether a treaty is a *law to executive officers*, nor whether it can repeal

an act of Congress over a subject of delegated legislative power—a municipal law, operating *infraterritorally*.

And the Attorney General does not venture a decided opinion whether an international copyright treaty could repeal or enlarge the act of Congress as to copyright.

The proposed treaty did not in fact attempt to repeal the copyright act of Congress. It only proposed to give the *same privileges* to foreigners as were enjoyed by citizens.

The act of Congress did not *prohibit* this; it only *omitted* to give such right to foreigners. The treaty was in addition to, but not in opposition to, the act of Congress.

In 6 Opinions, 658, the Attorney General considered the question, whether the act of July 22, 1854, made lands subject to pre-emption which had been *previously* by treaty stipulations *agreed* to be otherwise disposed of. As there were such treaties, addressing themselves to the discretion of Congress to execute them, it was held that *such lands* were not covered by the act of 1854. The question passed on *was not a question of constitutional or legislative or treaty power*, nor even *of legislative or treaty supremacy*, but *only a question of legislative* INTENT.

The Attorney General says:

"In fine, my opinion is, that the act of Congress gives pre-emption only in such of these lands ceded as are not required first to be off-red at public sale.

"That the lands ceded by the Delawares, Iowas, and Weas, under condition of first being offered at public sale, are no more opened to pre-emption by the act of Congress than was the military reservation at Fort Leavenworth; that those lands cannot be taken up by settlers under claim of pre-emption."

That decided nothing as to the power of Congress by *prospective* legislation to require all Indian lands to be subject to pre-emption when the Indian title should be extinguished. That decided nothing as to the effect of a treaty, or as to the treaty power. No such question was made. It only decided that the act of July 22, 1854, did not operate *retroactively* to subject to its provisions lands *theretofore agreed to be sold by treaty*. It decided that in a given case a pre-emption claim *did not exist under the act*. It gave a construction as to the *retrospective operation* of the act. It is a rule, that acts shall

not be construed to operate retroactively, if the language will admit of any other construction.

That opinion did not decide on the *prospective operation* of the act on lands to which the Indian title "shall be extinguished."

Attorney General Cushing referred to the Kansas treaties as "*compacts*," and said the Indians were entitled to the exercise of "good faith." He evidently looked to legislation to carry out treaties. (6 Op., 654.)

He held only that the act of 1854 did not *repeal* the *prior* treaty stipulations. He said:

"The pretense of repeal is in the assumption of *implied repeal* by incompatibility of provisions."

In 9 Opinions, 25, Attorney General Black considered the treaty rights of the Delaware Indians of Kansas. But certainly the treaties and legislation in reference to these Indians prove that an Indian treaty, unaided by act of Congress, cannot dispose of the public lands. By article 13 of the Delaware treaty of May 6, 1854, (10 Stat., 1051,) it was agreed—

"That there shall be confirmed by patent to the said Christian Indians, subject to such *restrictions as Congress may provide*, a quantity equal to four sections of land, * * to include their improvements."

This gave no fee simple title, but only a right of occupancy to a *tribe*, and even this was subject to the control of Congress. On the 21st of May, 1857, a patent was issued to the Indians for the lands, and they sold them to A. J. Isaacs for $43,400, but an act of Congress was passed June 9, 1858, to confirm the sale. (11 Stat., 312.) This shows that no title in fee passed by virtue of the treaty, for it expressly made the lands "subject to such restrictions as Congress may provide." Here was a clear recognition of the power of Congress over the lands.

Then the act of June 9, 1858, declared—

"That upon the payment of said sum of $43,400 by the said A. J. Isaacs to the Secretary of the Interior, for the use and benefit of said Christian Indians, * * it shall then be the duty of the President * * to confirm said sale."

As a condition precedent to the issuing of a patent, the treaty required the payment of a sum of money to the Secretary of the Interior for the use of the Delaware Indians.

Congress provided by law for the payment, and it *was paid*. Here, again, was the *legislative* sanction to the treaty, and this was done prior to the opinion of the Attorney General.

The treaty of July 16, 1859, (12 Stat., 1105,) "assigned in severalty" small tracts of land to specified Indians. But they acquired no fee simple title, for it is provided that—

"Said tracts shall not be alienated in fee, leased, or otherwise disposed of except to the United States or to the members of said bands of Indians. * * The Secretary of the Interior shall make rules and regulations * * respecting the disposition of any of said tracts in case of the death of the persons to whom they may be assigned, so that the same shall be secured to the families," &c.,

and in case of abandonment the Secretary may make such disposition as he deems proper.

Here again no absolute title was derived under a treaty.

Congress asserted its power over the public lands by act of 3d March, 1859, (11 Stat., 431,) authorizing patents to issue for "separate selections," made under treaties in Kansas.

In 10 Opinions, 508, the Attorney General *ad interim* considered the VIth article of the Kansas treaty of June 3, 1825, (7 Stat., 245) and the act of December 22, 1854. (10 Stat., 599.

The treaty ceded lands to the United States, and then said:

"From the lands above ceded, * * there shall be made the following reservations of one mile square for each of the half breeds of the Kansas nation, viz: for Adel and Clement; for Laventure, the son of Francis Laventure," &c.

These reservations were expressly ratified by act of May 26, 1860. (12 Stat., 21, 628.)

The subsequent act of December 22, 1854, provided:

"That in case of any claim to land * * which has heretofore been confirmed by law, and in which no provision is made by the confirmatory statute for the issue of patents, * * it shall be lawful to issue patents."

The *ad interim* attorney held that the act of Congress authorized a patent to Laventure specified in the treaty. So far this opinion rests on an act of Congress.

The opinion proceeds to say the "*treaty*" is a "*statute*" within the meaning of the act, and that the treaty power is "the law-making power in one of its forms!"

But that was *ad interim obiter dictum*. And if the treaty power is a law-making power on all legislative subjects, the *ad interim* does not venture to say it is *supreme over an act of*

Congress. He does *not* say *Congress cannot restrain it.* Yet, all this must he asserted to give validity to the Cherokee treaty.

In 11 Opinions, 145, Attorney General Speed considered the Shawnee treaty of May 10, 1854. (10 Stat., 1054, art. II.)

That treaty cedes lands to the United States, and then lands are set apart for Indian occupancy, out of which it is provided, that—

"There shall be * * set apart to the missionary society of the Methodist Episcopal Church South, to include the improvements of the Indian manual labor school, three sections of land."

Provision was made for *separate selections* for Shawnees.

And the treaty provided as follows:

"It is agreed that all the tracts of land in this article [which includes the clause as to the missionary society] assigned, or provided to be assigned or selected, shall be assigned and selected according to the legal subdivisions of the United States lands, and according to the laws of the United States respecting the entry of public lands, so far as such laws are applicable. * *

"ART. 9. *Congress may hereafter provide for the issuing* to such of the Shawnees as may make separate selections *patents* for the same, with such guards and restrictions as may seem advisable for their protection therein."

Now, it will be noticed the act of July 22, 1854, (10 Stat., 310) had not yet passed which dedicated lands to pre-emption when the Indian titles should be extinquished.

This treaty, too, recognizes *legislative* supremacy as to the lands.

It concedes legislation necessary to issue patents. The act of March 3, 1859, (11 Stat., 431,) did provide for patents for these separate sections.

An opinion that the missionary society should recieve a patent, then, would still leave *an act of Congress as that of July 22, 1854, to be supreme over future treaties,* and this would defeat this Cherokee treaty here.

With all these recognitions of the necessity for legislation, it is not strange that the opinion of the Attorney General should be asked before venturing to issue a patent, even to a missionary society of the Methodist Episcopal Church South.

Upon the opinion of the *ad interim* Attorney General, already referred to, (10 Opinions, 508,) this grant to the mis-

sionary society was confirmed by the act of December 22, 1854, (10 Stat., 599,) and, according to the authority of 6 Opinions, 658, this confirmation could be had.

I now proceed to *deny* the proposition—

III.

That so many interests are involved in treaty titles that public policy requires that they should not be disturbed.

An examination of the Indian treaties and of the acts of Congress will show that in most of the cases where grants have been made to individuals by treaty or sales of land stipulated for, the treaties were either authorized by act of Congress or subsequently ratified or their execution provided for.

No treaty stipulated for a sale of lands until the treaty of February 27, 1819, (7 Stat., 195,) and the first grant in operative form was by the Seneca treaty of February 28, 1831, (7 Stat., 350, art. 2.) If the ruling in 10 Opinions, 508, be correct, the act of December 22, 1854, (10 Stat., 599,) ratified all previous titles under treaties. (And see act, May 30, 1854, 10 Stat., 290, sec. 37.) The act of March 3, 1859, (11 Stat., 431,) authorized patents to all "separate selections" in Kansas.

If the ruling in 3 Opinions, 56, be correct, most of the individual reservations were authorized by act of Congress.

A decision, therefore, now against the treaty grant claimed by James F. Joy will disturb no great interests.

Since the act of 1862 extended the pre-emption acts over lands to which the Indian title might thereafter be extinguished, no claims have accrued of such magnitude as to require the overthrow of the Constitution.

It is better to repose confidence in the healing and confirmatory power of Congress, or in its sense of justice to respond in damages, than to destroy any portion of the fabric of the Government.

I deny that any abuse or usurpation can destroy the Constitution in any of its parts, or blot out the charter of our liberties. Better that whole States in our system should perish than this.

If an abuse of the treaty power has grown up, it is high time it should be corrected. For nearly three quarters of a century the State courts exercised admiralty jurisdiction, but it was swept away by a decision of the Supreme Court. (4 Wallace, 411, 556, 569.)

Attorney General Akerman, in his Civil Service Opinion of August 31, 1871, said:

"It more concerns us to ascertain what is the constitutional rule than to learn whether that rule has always been observed. Nineteen violations of the Constitution do not justify a twentieth."

The errors of administrative officers cannot make constitutional law.

Treaties made, addressing themselves to the legislative discretion for execution, do not prove that they are operative laws to executive officers, nor do they make constitutional law.

The most devout reverence for precedents cannot require that an ephemeral practice of a few modern years, by officers unskilled in constitutional law, and "upon a question of governmental power so important as this, could settle forever the meaning of the fundamental law of a great State. It required six centuries of struggle to settle down the constitution of England on the basis of the great charter, and no parliamentary precedent of the rights even of the Plantagenets or the Tudors was allowed to stand in the way of the progressive movement that culminated in the revolution of 1688." (74 Globe, 19.) Nothing is or ever can be *settled* until it is settled *right*.

An examination of indian treaties in the first half century of our history will show that it never was understood that they could dispose of the public lands. (See appendix A to this brief.)

Before reaching another question made in this case, I may state again that the Indians have no fee simple title in the public lands. (1 Story on Const., pp. 3, 101; *Cherokee Nation* v. *Georgia*, 5 Peters, 48; *Worcester* v. *Georgia*, 6 Peters, 580; *Johnson* v. *McIntosh*, 8 Wheat., 574, 579; *Mitchell* v. *United States*, 9 Peters, 745; *Lattemer* v. *Poteet*, 14 Pet., 14; *United*

States v. *Hernandez*, 10 Peters, 303; 8 Opinions Attorneys General, 255, 262.) These cases show that the Indians have always been regarded as having a mere occupany by permission, so much so that Chief Justice Marshall said of the title and occupancy while European nations governed here:

"The different nations of Europe * * asserted the ultimate dominion to be in themselves, and claimed and exercised a power to grant the soil while yet in the possession of the natives."

Whatever power *is conferred by the Constitution* on one department of the Government cannot be abrogated by any other, nor can its exercise be *prohibited* by any other. This is necessarily self-evident, for otherwise the Government would be self-destructive, and we might inscribe upon the Constitution—

"Nil fuit unquam sic impar sibi."

IV.

The character of the Cherokee title did not withdraw it from the operation of the acts of 1854, (10 Stat., 310,) or 1862, (12 Stat., 413,) nor authorize the treaty power to dispose of it in violation of these acts.

THE CHARACTER OF THE INDIAN TITLE IMMATERIAL.

By the treaty with France of 1803, the United States became the absolute owners in fee of the neutral lands.

I can not see that it is very material in this case what the character of the Cherokee title was.

Our whole history shows that the Cherokees and their lands are *subject to legislative control.*

And if the tribe could even take a fee simple, as they could not, yet it was an "*Indian title*," and by the express terms of the act of July 22, 1854, (10 Stat., 310,) "all the lands to which the *Indian title* has been or *shall be extinguished*, shall be subject to pre-emption," &c.

This act, as that of June 2, 1862, made all lands subject to pre-emption. They permitted no exception. They regulated and limited all future treaties. The Indians now *have*, or *have not*, the title. If they have *not*, their title is "extin-

guished." No one pretends that they have any title. These acts cannot be *evaded* by a cession in trust, for that is prohibited by their terms and purpose. It is not to be presumed that they were designed to be ineffectual.

It was competent by treaty to extinguish the Indian title. This has been done. All that the treaty attempted *beyond* that was in violation of law and void.

THE CHEROKEES INCAPABLE OF TAKING A FEE SIMPLE TITLE.

The Cherokees were incapable of taking a fee simple title. This is so by the law of nations, expressly recognized in the Constitution. They and their lands, as I have shown, were in all respects subject to the power of Congress. There never has been a time since the discovery of America when the Indians and their lands were not subject to legislative disposition and control.

No one now would venture to say that the Cherokees had the power to sell the neutral lands to private individuals, or to a foreign nation. In *Doe* v. *Wilson*, 23 Howard, it was said, without qualification, that "the Government *alone* can purchase lands from an Indian nation." It was because the Cherokees could not open a land office or sell these lands that they attempted by the treaty of 1866 to do, by indirection, what they could not do at all.

NO FEE SIMPLE EVER ATTEMPTED TO BE GIVEN THE CHEROKEES.

When the Constitution gave Congress the power to dispose of the public lands, the authority was given with reference to the manner in which it had been previously exercised by Parliament and by the Congress, under the Articles of Confederation. It was not a power to sell the fee or sovereignty *to Indian tribes.* And Congress never attempted to do so.

The act of May 28, 1830, did not authorize the President *to dispose of the fee.* He was authorized to make treaties for an exchange of lands. But in assigning lands to Indians for occupancy the act

"*Provided*, That such lands shall revert to the United States if the Indians become extinct or abandon the same."

Here were two conditions, upon the happening of either one of which the Indian right of occupancy should terminate.

But, in *addition* to this, their *possessory right* could be *extinguished by treaty*, or they could be removed by act of Congress.

Here were four conditions to terminate the possession.

The patent of December 31, 1838, declares that it is

"Subject also to the condition provided by the act of Congress of the 28th of May, 1830."

The law of nations—the common law, incorporated into it the other conditions I have named. It was subject to these principles.

The patent contains the words—

"To have and to hold the same together with all the rights, privileges, and appurtenances thereunto belonging, to the said Cherokee nation forever."

This gave no fee. The whole patent must be construed together; and, more than this, the act of Congress and the law of nations limit and control it.

The act of May 28, 1830, and the patent gave no rights beyond the common-law right of occupancy. The patent was mere evidence of *this* right.

Whatever the Indian claim on the land was, it was *inalienable* by *them*, except only *to the United States*, as held in 23 Howard, and a title without power of unrestrained alienation cannot be a fee simple.

And so are the authorities.

Wharton's Law Dictionary, p. 297:

"FEE SIMPLE: A freehold estate of inheritance, absolute and unqualified, stands at the head of estates, as the highest in dignity, and the most ample in extent, since every other kind of estate is derivable thereout and mergable therein. * * A fee simple generally is pure, without condition and unrestrained, except by the laws of escheat and the canons of real property descent. * * A person who holds 'in fee simple' is he which hath lands or tenants to hold, to him and his heirs forever; for if a man would purchase lands or tenents in fee simple, it behooveth him to have these words in his purchase, to have and to hold to him and his heirs; for these words (to his heirs) make the estate of inheritance.

In practice, the phrase universally adopted in the designation clause of deeds, in order to transfer a fee simple absolute, is, to A, his heirs and assigns forever, * * an uncontrol'able power of alienation, whether by deed, gift, or will."

Lands, the title to which had passed out of the United States, and that lay within the limits of a State of this Union,

would, in the absence of heirs to inherit, escheat to the State in which they were situated; but lands, the title to which had not passed from the Government, but which were occupied by Indians, would, on the extinction of the Indians, or on their abandonment of the lands, escheat to the United States, even though they lay within a State, and this without any special legislation: the lands always being held by the Indians in occupancy only.

Wharton's Law Lexicon, p. 359:

"FEE SIMPLE: A freehold estate of inheritance, *absolute* and *unqualified*. * * An *uncontrollable* power of *alienation*, whether by *deed*, *gift*, or *will*."

Kent's Commentaries, vol. 4, p. 4:

"Fee simple is a pure inheritance, clear of any qualification or condition, and it gives a right of succession to all the heirs generally. * * It is an estate of perpetuity, and confers an unlimited power of alienation, and no person is capable of having a greater estate or interest in land. Every restraint upon alienation is inconsistent with the nature of a fee simple; and if a partial restraint be annexed to a fee, as a condition not to alien for a limited time, or not to a particular person, it ceases to be a fee simple."

In Blackstone's Commentaries (vol. 1, book 2, p. 104) it is said:

"A fee, therefore, in general, signifies an estate of inheritance, being the highest and most extensive interest that a man can have in a feud; and when the term is used simply, without any adjunct, or has the adjunct of *simple* annexed to it, (as a fee simple,) it is used in contradistinction to a fee conditional at the common law, or a fee tail by the statute, importing an absolute inheritance, clear of any *condition*, limitation, or restriction to particular heirs, but descendable to the heirs general, whether male or female, *lineal or collateral*."

Webster's Dictionary:

FEE SIMPLE. An absolnte fee or fee simple is land which a man holds to himself and his heirs forever. In America, where lands are not generally held of a superior, a fee or fee simple is an estate in which the owner has the whole property, without any condition annexed to the tenure.'

It has been urged that by the Cherokee treaty of 1835 it was agreed, that the United States should

"convey to the said Indians and their descendants, by patent in fee simple," &c.

But the same treaty provides that the lands shall be included in a

"patent executed to the Cherokee nation of Indians by the President of the United States, according to the provisions of the act of May 28, 1830." (7 Stat., 478.)

And this act did *not authorize*, but prohibited, the conveyance of a fee.

The treaty could not go beyond the statute which authorized it. And to cling to *some* of the mere words of the treaty, without reference to the provision making the patent subject to the provisions of the act of 1830, would call for more than the denunciation of the maxim *qui hæret in litera hæret in cortice*. All must be taken and read together. And with this it is clear no fee simple was even intended to be conveyed by the terms of the treaty. It could not make one.

The Indians as a nation had no *corporate* capacity. They cannot sue in our courts. They are not a nation known to foreign powers. They therefore could not take a fee simple title.

All the conditions have arisen upon the happening of either *one* of which pre-emption claimants are entitled to secure title to these lands. The Indian title has been "extinguished." This is clear from what has already been said.

The Indians have "abandoned" the lands. They no longer occupy them. The bill in this case shows this fact. No labored argument is needed to prove the abandonment.

Felix Grundy, Attorney General, said, in relation to a Creek reservee, (3 Opinions, 390:)

"Nothing more is necessary than to ascertain that the reservee left and removed from the land without an intention of returning and occupying it as his place of residence. * * My opinion is, that so soon as a voluntary abandonment and removal from the premises actually took place, from that time the right of the United States accrued, and was perfect and complete; and although the register and receiver could not act until they had a knowledge of such abandonment, still the *rights of individuals might well* and *legally have their origin* to different *portions of said land, according to the then existing laws*, or *laws which might be passed by Congress.*"

Attorney General Butler (Op., vol 3, p. 230,) defines abandonment as—

"Ceasing to have any direct personal connection with the use and enjoyment of the land. No judicial proceedings or actual entry on the part of the United States will be necessary to vest the estate in the United States. Whenever the estate of the Indian reservee shall have determined, the land becomes a part of the public domain. *Its liability to entry for floating claims, or for other purposes, will from that time be the same as if it had then for the first time been ceded to the United States.*"

And if there could by any possibility be doubt as to whether the Cherokees have "abandoned" the lands, it is certain that the Cherokee treaty could not, in flat violation of the acts of 1854 and 1862, give any title to James F. Joy.

NO RATIFICATION OF ANY FEE.

The act of July 2, 1836, (5 Stat., 73,) "making further appropriations for carrying into effect certain Indian treaties," appropriates money—

"For the amount stipulated to be paid for the lands ceded in the first article of the treaty with the Cherokees of the twenty-ninth of December, one thousand eight hundred and thirty-five, deducting the cost of the land to be provided for them west of the Mississippi, under the second article of said treaty, four million five hundred thousand dollars."

But this *gives* no fee simple title. It gives nothing but money. It recognizes the fact that a treaty had been made and, as the title of the act indicates, "*carries into effect*" the *stipulation to pay money*. This was its *sole purpose*. The treaty was made *subject to the restraints* of the act of 1830. Congress, in passing the appropriation act, so *understood it*. For otherwise this act must be construed to *repeal* or modify the act of 1830.

Repeals by implication are not favored, yet to hold, that the act of 1836 repealed or modified the act of 1830, would be the most forced repeal by implication on record. There is no direct repeal and none can be inferred.

It is not to be presumed that Congress intended the treaty to be so construed as to make it illegal, in excess of the authority conferred by the act of 1830, and it is not to be presumed there was a ratification of unauthorized treaty provisions. Nothing can be construed a ratification of such provisions but language unequivocal for that purpose.

A ratification, to have the effect of repealing acts of Congress by implication, must be unequivocal.

The principle of ratification applicable to contracts cannot apply to statutes. (*Fremont* v. *United States*, 2 N. & H, 461; *Adams* v. *United States*, 2 N. & H., 70; *Fremont Loan Co.*, v. *Walworth*, 1 Comst. R., 447.) But if it could, it would not reach to the extent suggested.

V.

NO TREATY SALE AUTHORIZED BY LAW.

During the era of the Articles of Confederation, the States "made war and peace with the Indian nations," and claimed

or exercised the power to make treaties. (House Rep., 37, 2d Sess. 40th Cong.)

The State of Massachusetts had the right of pre-emption to certain Indian lands in New York occupied by tribes. Other States, perhaps, had or claimed similar rights. The legislature of Massachusetts granted the fee simple of lands, and a treaty was made September 15, 1797, to surrender the Indian right of occupancy to individuals. (7 Stat., 601.)

The Constitution took away the right of States to make treaties; but Congress, in view of the fact that States owned lands, passed

"An act to regulate trade and intercourse with the Indian tribes."

Many of its provisions were temporary, and hence all were made so. It provides, among other things—

"That no sale of lands made by any Indians, or any nation and tribe of Indians, within the United States, shall be valid to any person or persons or to any State, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, *held under the authority of the United States.* This act shall be in force for two years from thence to the end of the next session of Congress." Approved July 22, 1790. (1 Stat., 138.)

It was in pursuance of this act, and of the act of 3 March, 1802, (ch. 13, sec. 12,) that the treaty was made to which I have referred, and by which Robert Morris acquired lands in New York. The object of the act of 1790 was not to authorize treaty sales from the *United States* to individuals, but to prevent treaties, except such as might be held "*under the authority of the United States;*" that is, in pursuance *of act of Congress.* The act of August 20, 1789, (1 Stat., 54,) to authorize treaties under the authority of the United States, preceded this act, which *is prohibitory on States and individuals,* claiming by treaty as against the United States, and it was followed by the act of March 26, 1804, (2 Stat., 289,) which prohibited Indian sales to individuals or States of land owned by the *United States,* and regulated all sales of Indian *titles to the United States. This was the object of all these acts.*

The act of 30th March, 1802, (2 Stat., 141, sec. 12,) applicable to all Indian lands in the United States, and the act of June 30, 1834, (4 Stat., 729, sec. 12,) contained provisions substantially as follows:

"No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. And if any person not employed under the authority of the United States shall attempt to negotiate such treaty or convention, directly or indirectly, to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, such persons shall forfeit and pay one thousand dollars: *Provided nevertheless*, That it shall be lawful for the agent or agents of any State, who may be present at any treaty held with Indians *under the authority of the United States*, in the presence and with the approbation of the commissioner or commissioners of the United States appointed to hold the same, to propose to and adjust with the Indian the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty." (Act June 30, 1834, sec. 12, 4 Stat., 729)

It will be seen, too, that the treaties here contemplated were only such as "extinguished," "their [Indian] *claim* to lands." This was not an act for the sale of the *title of the United States*. It was not an act to determine our land policy. That was controlled by other laws. This act only contemplated such treaties as that under which Robert Morris claimed.

This act had the same object in view. But it gave no power to sell the lands of the *United States* to individuals by treaty; for, as said in *Mann* v. *Wilson*, 23 Howard—

"The Government alone can purchase lands from an Indian nation."

And Attorney General Black, in 9 Opinions, 24, decided, as to lands which were confirmed to the Christian Indians by treaty *and acts of Congress, that*

"No private person can procure a conveyance from the tribe or even negotiate with it for that purpose without making himself an offender against the act of Congress of June 30, 1834."

And in the same opinion it was affirmed that, although the Indians had a fee simple title ratified by acts of Congress, and with patents issued, yet—

"The right which the patentees would otherwise have to alien these lands may be restricted by act of Congress after the patent shall issue as well as before."

The acts of Congress of 1854 and 1862 did and do restrict the right of the Cherokees to alien these lands to individual purchasers. For even if the act of 1834 could confer such right, the act of 1862 could *take it away*.

But whatever might be claimed from these acts, the whole disposition of the public lands was settled by the acts of 1854 and 1862.

And they controlled all prior legislation and prohibited any

disposition of the public lands, except that which gave them to pre-emption entries, &c.

The act of 1863 has already been considered.

Finally, if there were no act of Congress applicable to the neutral lands, yet there is no title in James F. Joy. And this brings us to a consideration of the last one of the five propositions which I have made that—

PROPOSITION V.

An Indian treaty which undertakes to dispose of the public lands without the authority of an act of Congress is unconstitutional and void. The power to dispose of the public lands is by the Constitution delegated to Congress, and cannot be exercised except in pursuance of an act of Congress.

Many of the authorities which I have already cited fully sustain this position, and I need only refer to them without again quoting them.

A treaty cannot take away or interfere with the exercise of a power expressly conferred by the Constitution on Congress, for *infraterritorial* municipal purposes. This is true of the powers conferred expressly on the President, on the courts, and on Congress.

The Constitution gives to the President several *enumerated* powers:

"The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States. He shall have power to grant reprieves and pardons for offences against the United States. He shall have power, by and with the advice and consent of the Senate, to make treaties. He shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments. He shall, from time to time, give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both Houses, or either of them. He shall take care that the laws be faithfully executed, and shall commission all the officers of the United States."

These powers cannot be taken away or impaired by any power, neither by treaty nor Congress. They may be "regulated" by law.

It has been held that the power to appoint diplomatic agents cannot be limited by act of Congress. (7 Opinions, 186.)

The power to grant pardons is unlimited in its operation, and not subject to legislative control. (*Ex parte Garland*, 4 Wall., 334.)

The Constitution provides, that

"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

Congress cannot confer original jurisdiction on the Supreme Court beyond this. (*Marbury* v. *Madison*, 1 Cranch, 137; *In re Metzger*, 5 How., 191; *In re Kaine*, 14 How., 119.)

This jurisdiction cannot be taken away by act of Congress or treaty.

The Constitution, in substantially the same form in which it delegates express and *exclusive* powers to the President and to the Supreme Court, *expressly delegates* to Congress the distinct power in these words:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

If neither Congress nor a treaty can take away or impair the President's pardoning power, or the power to make appointments to office, or the power of this court to exercise its original jurisdiction, how can the treaty power, and much less an Indian treaty, take away or interfere with the power of Congress to dispose of the public lands.

No reason can be given to sustain the treaty power in an attempt to destroy the authority of Congress to dispose of the public lands, which will not equally sustain the treaty power in an effort to annihilate the executive power of pardon, appointments to office, to command the army, &c., and the power of this court to exercise its original jurisdiction.

All these powers are alike conferred by the Constitution. All alike are given without limitation in the terms which confer them.

The power to dispose of public lands *infraterritorially*, and for individual ownership, by treaty never was exercised by England, France, or Spain on this continent; was not during

the Continental Congress, under the Articles of Confederation, nor until recently under our Constitution.

It is *not a subject of treaty jurisdiction.* It is made by the Constitution *legislative.* It is not necessary there should be any such treaty power. But the question is not one of necessity, but of constitutional law.

As the power is made legislative by the Constitution, it cannot be taken away upon any theory that by so doing the treaty power can accomplish something it could not otherwise attain.

The partition of power among the different departments of the Government gives each an exclusive authority. Each is as exclusive of the other as it is exclusive of State authority. And it has been said that:

"Whenever the terms by which a power is granted to Congress, or whenever the nature of the power itself requires that it should be exercised *exclusively* by Congress, the subject is as completely taken away from the State legislatures as if they had been expressly forbidden to act on it. (1 Abbott's U. S. Practice, 357, citing *Sturges* v. *Crowninshield*, 4 Wheat., 122, 196; see *U. S.* v. *Cornell*, 2 Mass., 60; *Hallett* v. *Doe*, 7 Alab., 882; 3 Wash., C. C., 313; 5 Am, Law Jour., 2 N. S., 502; 3 McLean, 185; 1 West. Law Jour., 15.)

And now I proceed with other reasons to show that the power of Congress over the public lands *infraterritorily* is *exclusive*—

I.—*The authority of the courts.*

In *Johnson* v. *McIntosh*, 8 Wheat., 587, Chief Justice Marshal says:

"The power now possessed by the Government of the United States to grant lands resided, while we were colonies, in the crown or its grantees. The validity of the title given by either has never been questioned in our court. It has been exercised uniformly over territory in possession of the Indians. *The existence of this power must negative the existence of any right which may conflict with and control it.*"

In *Bagnell* vs. *Broderick*, 13 Peters, 450, it is said:

"Congress has the *sole power* to declare the effect and dignity of titles emanating from the United States."

In *Wilcox* vs. *Jackson*, 13 Peters, 517, it is said:

"We hold the true principle to be this, that whenever the question in any court, State or federal, is whether a title to land which had once been the property of the United States has passed, *that question must be resolved by the laws of the United States.*"

In *Cherokee Nation* v. *Georgia*, 5 Peters, 44 Baldwin, J., in discussing the power given to Congress to sell, said:

"It excludes necessarily the action of all others that would perform the same operation on the same thing."

In *United States* v. *Nicoll*, Paine's C. C. R., 649, involving the power of an officer of the Government to sell lead owned by the United States, it is said:

"The Constitution declares that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States. No public property can, therefore, be disposed of without the authority of law, either by an express act of Congress for the purpose, or by giving the authority to some department or subordinate agent.

"No law has been shown authorizing the sale of this lead. Our Government being a Government of laws, it speaks to its agents through its laws, and it is to them only that we are to look for the authority of such agents. And no law having been shown authorizing the sale of the lead in question, or vesting in any department of the Government any general authority to sell public property, no such sale can be inferred from any of the circumstances appearing in this case."

In *Foster* v. *Neilson*, 2 Peters, 307, it is said:

"It is the province of the court to conform its decisions to the will of the legislature."

The Constitution gives "*all*" legislative power to Congress on certain enumerated subjects. In *Scott* v. *Sanford*, Mr. Justice Curtis insisted that "*all*" meant *all;* that Congress *alone* could judge of what was "needful." And if there were differences of opinion among the members of the court as to *how far* this power extended to make regulations respecting the government of territories and slaves, there were none expressed as to the *plenary* and *exclusive* authority of Congress to dispose of the public lands.

In *United States* v. *Fitzgerald*, 15 Peters, 421, the Supreme Court say:

"No appropriation of public land can be made for any purpose but by authority of Congress."

(See 2 American Law Review, 385; *Sumner* v. *Coleman*, 23 Ired., 91; *Irvine* v. *Marshall*, 20 How., 558; *People* v. *Folsom*, 5 Cal., 373.)

2. *Opinions of Attorneys General.*

The Attorneys General have been equally emphatic in their opinions:

"Congress has the exclusive power, under the Constitution, to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States. (Opinions, vol. 4, p. 696, Clifford, Attorney General.)"

Again, page 706:

"The power over the public lands is vested by the Constitution exclusively in Congress, and the President has no authority over the subject, except what may be inferred from the general power to see that the laws are faithfully executed, unless it be conferred upon him by an act of Congress. Nor can the power, when conferred, be exercised in any other form or mode of proceeding than that which the law prescribes. This view is too firmly established by the Constitution as a primary principle in the distribution of its powers to need any confirmation, and the proposition is too palpable to require any illustration to ce it."

Attorney General Mason said:

"The third section of the fourth article of the Constitution declares that the Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory and other property of the United States. The term employed was adopted from the ordinance of 1785, and comprehends every mode by which the lands and other property of the United States could be parted with by the Government, whether by sale, gift, or for any limited interest. This power has been invariably exercised by Congress. The sales of the public lands, the territorial property of the United States, have been in all cases directed and regulated by law." (4 Opinions, 86.)

I have already cited the opinion of Attorney General Legare, (3 Opinions, 721,) that as against a treaty, the Executive, in relation to the disposition of lands, was—

"Bound by the will of Congress in the premises."

And on a similar question he said of Congress—

"Its will is our law. (3 Opinions, 737.)

Under the act of June 14, 1809, the President selected Rock Island for a military reservation. A question arose as to whether it was subject to pre-emption.

Attorney General Black (10 Opinions, 361) said:

"This selection of Rock Island for military purposes was not the unauthorized act of the President, but was made in the exercise of a discretion vested in him by Congress. The Constitution vests in Congress the power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States. The word 'territory,' as here used, is held to be equivalent to the word 'lands,' (United States *v.* Gratiot, 14 Peters, 537;) and the power to dispose of the public lands under this clause, whether by sale or by appropriation to other uses, belongs to Congress and not to the President. It will be conceded, I suppose, that without authority of Congress the President could not have selected a portion of the public lands, and by the erection and occupancy of a fort devoted it to military purposes. In every instance where this has been done sufficient legislative authority will be found for the act, either in the form of a general statute, such as the act of 1809, or of special enactment. The withdrawal of the land from the uses to which, under the authority of an act of Congress, it had been appropriated, and its appropriation to other and different uses, would be simply an attempt to dispose of it, the power to do which, as we have seen, resides only in Congress.

"The appropriation of the public domain, either to public or private use, is eminently an act of sovereign power. It is the exercise of ownership, and im-

plies the right of control over the title. It is the conversion of the property of the nation equal in responsibility and gravity with the appropriation of the public money, and derives its authority from the same high source. Under our system this extreme power resides only in Congress. As the Executive can draw no money from the Treasury but in consequence of an appropriation made by law, so he cannot divest the title to a foot of the public lands without the same legislative sanction."

3. *The elementary writers.*

In 1 Story on the Constitution, 374, it is said:

"There are many reasons which may be assigned for the engrossing influence of the legislative departmrnt. In the first place, its constitutional powers are more extensive and less capable of being brought within precise limits than those of either of the other departments. *The bounds of the executive authority are easily marked out* and defined. It reaches few objects, and those are known. It cannot transcend them without being brought in contact with the other departments. *Laws may check and restrain and bound its exercise.* The same remarks apply with still greater force to the judiciary. The jurisdiction is or may be bounded to a few objects or persons, or, however general, or unlimited its operations are necessarily confined to the mere administration of private and public justice. It cannot punish without law. It cannot create controversies to act upon. It can decide only upon rights and cases as they are brought by others before it. It can do nothing for itself. It must do everything for others. It must obey the laws, and, if it corruptly administers them, it is subjected to the power of impeachment. On the other hand, the legislative power, except in the few cases of constitutional prohibition, is unlimited. It is forever varying its means and its ends. It governs the institutions and laws and public policy of the country. It regulates all its vast interests. IT DISPOSES OF ALL ITS PROPERTY. Look but at the exercise of two or three branches of its ordinary powers. It levies all taxes; it directs and appropriates all supplies; it gives the rules for the descent, distribution, and devises of all the property held by individuals. It controls the sources and resources of wealth. It changes at its will the whole fabric of the laws. It molds at its pleasure almost all the institutions which give strength and comfort and dignity to society."

There are numerous authorities, to some of which reference has been made, to the effect that treaties *may contract* to regulate subjects intrusted to Congress as delegated powers, but that such treaty provisions are inoperative until Congress legislates to execute them.

This is only another mode of saying that when a treaty goes *beyond its power*, if Congress enacts a law to effect the same object, then it will be effected. So it will, not by the *treaty* power, but by the *legislative*.

The elementary authority of the note to Tucker's Blackstone is to this effect.

Hamilton, as I have shown, even denied that a treaty could make municipal regulations *infraterritorially*.

In Paschal's Annotated Constitution, 238, it is said:

"No property belonging to the United States can be disposed of except by

the authority of an act of Congress." (Note 231, citing United States *v.* Nicol, 1 Paine, 646; 19 Howard, 615; 2 Story's Const., 3d ed., p. 213.)

And again:

"All such laws * * are necessarily exclusive and supreme." (Sims's Case, 7 Cush., 729.)

And now as to the *reasons* upon which these *authorities* rest. They have been already noticed to some extent in the discussion of the propositions heretofore presented. The reasons and authorities now stated support, to some extent, some of the positions already advanced.

I may state again that the Indians have no fee simple title in the public lands.

The Indians have no power of sale.

Jackson v. *Porter*, Paine, 457; *Fletcher* v. *Peck*. 6 Cranch, 87; *Johnson* v. *McIntosh*, 8 Wheat., 543; *Pejebscott* v. *Cushman*, 2 Greenl., 94; *Jackson* v. *Hudson*, 3 Johns., 375; *Jackson* v. *Wood*, 7 Johns, 200; *Buchanan* v. *McClure*, 1 Binn., 385; *Marshall* v. *Clark*, 4 Call, Va., 268; *Halloway* v. *Buck*, 4 Litt., 293; *Godfrey* v. *Beardsley*, 2 McLean, 412; *Veeder* v. *Guppy*, 3 Wis., 502; *Chotean* v. *Molony*, 16 How.. 203.

No one department or officer can usurp the powers of or encroach on another; for a power to encroach is a power to destroy. There must be either *separate* and *independent* orbits for the exercise of *each power*, or, in the cases where powers may be *concurrent*, one must be *inherently supreme*.

The legisiative power might enact that the President and Senate should not consent to a treaty of peace, and it would address itself to the judgment and discretion of the treaty power, but it could not prohibit the exercise of the delegated *power* to make a treaty of peace with a foreign nation.

So a treaty equally impotent might agree that public lands should be sold, but that could not sell them, or authorize an officer created by act of Congress to do so, nor defeat the delegated power of Congress as either expressed or to be expressed.

Now, having before us the judicial authorities, the opinions of elementary writers, of statesmen, and of the learned in national and international and constitutional law, the princi-

ples stated and arguments already advanced, and with all history in view, the unerring and unanswerable logic of them all leads to the conclusion that the legislative power to sell the public lands is supreme in the last resort, and exclusively so even as against an Indian treaty, which, in contravention of it, undertakes, by terms in form as operative in *præsenti*, as would be *dedi et concessi* to a party named, for the reasons stated, and some of which may be condensed as follows:

I. The public lands are the property of the United States by an allodial title in fee simple, and from the nature of the case no authority can sell but that of the United States, the owners. The sale being *infraterritorial*, is not within the scope of the treaty making power, which is *international*, or if it exist as to Indians, can only relate to their title by occupancy, and not to the fee.

II. The power to dispose of the public lands is given *expressly* as a *delegated power* to Congress by the Constitution, article IV, section 3, and is given in the same words which give other legislative powers, conceded by all jurists, writers, and statesmen to be *infraterritorially* supreme and exclusive, as the power to declare war, &c. The maxim applies, *noscitur a sociis*.

III. The power to sell lands is by universal consent admitted a *legislative* power, and as to this and other *legislative powers* the Constitution, in express terms, says that "*all* legislative powers" so given are "vested in Congress;" and if *all* legislative power is so given, there can be no hostile or conflicting power.

IV. The legislative power to sell is in the same clause which gives the power to establish territorial governments, and by its connection and for the same reasons, like it, must be exclusive. If the treaty power can usurp supremely the one, it may both, and thus indefinitely establish and continue a territorial government in a form to destroy both the delegated power to sell and to "admit new States." If the legislative delegated power to admit new States excludes a treaty power to establish territorial governments, the legislative delegated power to sell excludes a treaty power to sell.

V. The delegated power to dispose of the public lands confers the same high legislative power which was exercised *solely* by the legislative authority of the States prior to the deeds of cession to the United States. The Congress under the Articles of Confederation had or exercised the same *exclusive* legislative authority, and there was no treaty power of sale, and no treaty power independently of legislative authority.

And in England the *prerogative* power of sale was only *concurrent* and *subordinate* to the supreme legislative power to sell.

Even in the American colonies, before the Revolution, the public lands "could be granted by the crown or *colonial legislatures.*" (9 Peters, 713.)

And the delegated power to sell was inserted in the Constitution as a substittue for the previously exercised exclusive legislative power of sale, and for the purpose of excluding all executive authority over the public lands.

VI. In England the King, as lord paramount, clothed with the fee of the public domain, exercised by reason of that theory a *prerogative* power of sale. But it was not a *treaty* power. He could sell without the aid of a treaty. If a treaty was made authorizing a sale, *it only* extinguished the Indian right of occupancy, and it was the *union* of this "with the ultimate fee *which passed from the crown* by the license," [Crown permission to purchase.] (9 Peters, 713.) The license was a *prerogative*, not treaty power.

In this country our titles are *allodial.* The fee is not in the President. He can make no grant. The treaties and deeds of cession all convey to the United States. The Constitution, in giving Congress power to sell, regarded the feudal theory that the fee and power of sale were in the king as an evil, and abolished it. The fee and the power of sale alike fell from the executive authority and became *exclusively* subject to legislative power.

VII. An Indian treaty cannot sell or authorize a sale, because the Indians *have no fee*, and being unable to give what they *do not have*, can neither give nor assent to the exercise

of power over a *subject-matter* in which they have no interest. (13 Pet., 521.)

As they have no title and no power to confer, the President and Senate can, as to the fee, receive none from them, nor can any officer designated.

As the President and Senate, unlike the King, have no separate title, fee, or power over the lands, they can neither give nor exercise any. Where neither side has any power or title, two *incapacities*, having *nothing*, cannot confer power as to anything.

There can be no *union of power* over a subject, unless it be one in which each have or may have an interest always essential to grant a fee. An Indian nation, as such, is, unaided by act of Congress, incapable of receiving a fee; for if so, *they* could sell to foreign nations or individuals of their own right. The treaty power never did exist and never was exercised, except over a subject-matter the title of which might be received by either party to the compact. The Indians, as tribes, by our policy, are incapable of receiving the *right of soil or sovereignty*, and these alone have been the subject-matter of treaty jurisdiction, and that only, if at all, as a question of boundary, and between sovereign nations.

VIII. There can be no *supreme* power by an Indian treaty to sell the lands, because so to hold would destroy the *unquestioned exclusive* power of Congress to admit new States organized over territory owned by the United States. If a treaty can go *beyond* the settlement of an external boundary with a foreign nation, and sell our *infraterritorial* possession, it can select its vendees and sell to a foreign government or to savage tribes, and thus render the erection of States impossible. And it cannot be allowed that any delegated power of Congress can, by any other deportment, be destroyed even by indirection.

IX. As the Indians have no fee, and the President and Senate no power alone to sell, if a treaty with an Indian tribe can sell, it is by virtue of their *inherent* and *supreme* right to *contract* in relation to lands of the United States, whether in their occupancy or not, and without reference to location.

And if they have such powers, they can by treaty buy or authorize a sale of lands, no matter where situated, to individuals or foreign nations, to alien enemies or Chinese settlers, or buy or sell all our personal and real property, the navy, the Capitol and its grounds, the fee of which is in the United States.

X. No jurist, writer, or statesman has ever claimed that a treaty could *infraterritorially* usurp the place or perform the duties of an express delegated power, but such a power has been denied and repudiated by them *all.*

XI. As an absolute power conferred by the Constitution cannot rest for its *authority* on an act of Congress, nor be abolished or its exercise prohibited, it is proved by the concurrent voice of every department of the Government that there is no constitutional *infraterritorial* treaty power of sale; the many acts of Congress authorizing Indian treaties disprove it.

The almost unanimous vote of both Houses of Congress, March 1, 1871, to the conference committee report on the Indian appropriation bill, with a clause prohibiting Indian treaties, furnishes three hundred oaths, including the oaths of the treaty-making Senate, that there is no such constitutional power.

And the many acts of Congress regulating trade and intercourse with the Indian tribes prove that they are a subject people, liable to the legislative control of Congress, and as to them there is no constitutional treaty power supreme over the legislative will as to the public lands.

XII. The Constitution gives the President power, which legislation cannot take away, (3 Writings of Madison, 268; 4 *Ib.*, 370,) to "appoint embassadors and other public ministers," officers known to international law, and with power to make international treaties. It provides no such officers to make Indian treaties, but leaves them as subjects of legislative power. Indian affairs never have been managed by the Department of State intrusted with international subjects.

The Constitution, therefore, does not, without legislation,

authorize Indian treaties, and this whole subject is controlled by acts of Congress.

The Constitution, then, gives no power by Indian treaty to dispose of the public lands. It cannot, unless our whole history is false, the testimony of the men who made the Constitution untrue, and the jurists and statesmen who founded and have conducted the Republic through its entire career are all mistaken.

THE REMEDY BY BILL IN EQUITY.

In this case it may be said the bill cannot be sustained, either because the remedy is by defense in an action of ejectment at law, or because the plaintiff here has no such title as will authorize the court to decree in his favor.

The object of this case is to settle the question of the validity of the patent issued under the Cherokee treaty. The mere form in which the question shall be decided is not very material. The question is here in this case, and it arises on an ejectment in the case of *Warner* v. *Joy*, now pending in this court.

But the question may properly be decided in this equity proceeding. Assuming that the patent is void, and that a party in possession of the land could for that reason successfully defend in ejectment, yet this fact does not defeat the equity remedy.

The Kansas civil code provides that—

"An action may be brought by any person in possession, by himself or tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse interest or estate."

In the case of *Eaton* v. *Giles*, 5 Kansas Rep., 27, the supreme court of that State gave a construction to this provision of the civil code. The court say:

"If he (the plaintiff) be in possession, and some other party, by setting up some adverse claim thereto, renders his property less valuable, and his enjoyment of it less complete and satisfactory than his right, then he may demand an investigation and determination of the validity of this adverse claim. It has long been an established principle of the courts of chancery, to give relief to the holders of the legal title to real estate, where some adverse claim existed calculated to cast doubt or suspicion upon the title, or seriously embarrass the

owner, either in the maintaining of his rights or in disposing of his property, whether such adverse claim was quietly held or openly asserted. The section of our code quoted above goes further, and authorizes the interposition of the courts in cases where any person is "in possession by himself or tenant" to quiet his possession, as against any imperfect or insufficient claim of title."

I have already presented the authorities which show that the inchoate right which the plaintiff has in this case is one which will be protected by the courts if the defendant's patent is void; that the action of the executive department concludes no right, and when the register and receiver of the proper land office in Kansas refused to receive evidence that the plaintiff had complied with the pre-emption laws, and refused to receive payment for the land, their refusal could not defeat the plaintiff's right. And see *Samson et al.* v. *Smiley*, 12 Wallace R.; *Hughes* v. *United States*, 4 Wallace, 235; 6 Wallace, 418; 1 Penn. R., 501; *Gonzales* v. *Hoover*, 6 S. and R., 118.

The case of *Frisbie* v. *Whitney*, 9 Wallace, 187, does not hold any different rule. That case, referring to a pre-emption claim, held that:—

"This inchoate right may be protected by the courts against the claims of other persons who have not an equal or superior right, but it is not valid against the United States:" (See *Gregg* v. *Patterson*, 9 W. and S., 197.)

In 6 Wallace, 418, the court say:

"The right to patent once vested is treated by the Government, when dealing with the public lands, as equivalent to a patent issued."

And in 4 Wallace, 235, it was said it was the "duty of the United States to vacate" a patent improperly issued.

Here, if the positions already argued be correct, Joy has no right equal or superior to that of the plaintiff. He has none. His patent is a cloud upon the plaintiff's possession and upon his right, and should be removed.

WM. LAWRENCE,
Of Counsel.

B. F. BUTLER,
Of Counsel.

APPENDIX.

Appendix A to Brief.

Confederation.

Under the Articles of Confederation, nine Indian treaties were made, but none of them pretended to sell the public lands. (7 U. S. Stat., 13, 35.)

Under the Constitution.

From August 7, 1790, to September 15, 1797, seven Indian treaties were made, but no one undertook to sell the public lands; but lands were alloted to tribes for occupancy for hunting.

On the 15th September, 1797, a treaty was made "in pursuance of the act of Congress," and pursuant to "a resolution of the legislature of Massachusetts," by which the Seneca Indians conveyed their possessory right in certain lands in New York to Robert Morris, to whom they had been granted by the owner, the commonwealth of Massachusetts, in pursuance of law. Here the *legislative* power gave its sanction. (1 Stat., 54.)

From September 15, 1797, to 30th June, 1802, four Indian treaties were made, but none undertook to sell the public lands.

The act of Congres of March 30, 1802, ch. 13, § 12, (2 Stat., 141, 289,) and act of June 30, 1834, (4 Stat., 792,) authorized treaties to be made.

On 30th June, 1802, the Seneca Indians made two treaties "in pursuance of the Constitution *and of the act of Congress*," by which their *right of occupancy* was quit-claimed in small tracts of land to individuals named. (7 Stat., 70, 72.)

Three Indian treaties were made in October, 1802, and June and August, 1803, but no land sold.

The Kaskaskia treaty of August 13, 1803, (7 Stat., 78,) cedes their lands in Illinois to the United States, but "reserving to themselves, however, the tract of about 350 acres, near * * Kaskaskia, * * secured to them by act of Congress of 3d March, 1791, and also the right of locating one other tract of 1,280 acres within the bounds of that now ceded, which two tracts shall remain to them forever."

This was a reservation to the *tribes*, and only gave a right of occupancy.

By act of March 3, 1791, (1 Stat., 222,) lands were "appropriated to the use of the said [Kaskaskia nation of] Indians."

From this to November 16, 1805, ten treaties were made but no land sold.

By the treaty of November 16, 1805, (7 Stat., 98,) the Choctaws cede certain lands to the United States, reserving a tract two miles square for Alzira and Sophia, two half-blood Indians—

"Subject to the same laws and regulations as may be established in the circumjacent country, and the said Mingoes of the Choctaws request that the Government of the United States may confirm the title of this reserve in the said Alzira and Sophia." (Art I.)

By article XIV it is said that 1,500 acres had been granted to John McGrew, and the Indians "request the Government of the United States to establish the claim."

Subsequently to this, treaties were made of several classes, as, for instance, *stipulating* for—

I. Reservations of land to *tribes*, but not in fee.

II. Reservations to individual persons, not in fee.

III. Grants in fee simple, but requiring acts of Congress to execute them—mere contracts.

IV. Lands ceded to the United States in trust to sell and raise a fund, but requiring legislation.

V. Treaty grants, in form operative *per se*.

But all these were made under the authority of acts of Congress which authorized or were supposed to authorize them.

I.

RESERVATIONS TO TRIBES OF INDIANS NOT IN FEE.

1. Detroit treaty, November 17, 1807, 7 Stat., 106.

2. Chickasaw treaty, September 20, 1816, 7 Stat., 150.

The treaties of this description, including those fixing boundaries and making exchanges of lands with a mere occupancy right in Indian tribes, are so numerous it is not necessary to refer to them in detail.

The following are not exceptions to this class:

1. Riankishaw treaty, December 30, 1805, 7 Stat., 100, reserves to the *tribe* a right to locate 1,280 acres, "the fee of which is to remain with them forever." But as it is to the *tribe*, and as the act of March 30, 1802, 2 Stat., 141, prohibited them from selling, their title was merely that of occupancy.

2. Cherokee, January 7, 1806, 7 Stat., 102, reserves a tract to the *tribe*, and "the other reserved tract, on which Moses Melton now lives, is to be considered the property of said Melton and of Charles Hicks, in equal shares." This is no fee. It is the *first* case of a reservation to *individuals*. And the United States agree to "secure to the Cherokees the title to said reservation."

As to this reservation for the tribe, it is subject to the act of 1802, above cited.

3. Kickapoo, July 30, 1819, 7 Stat., 200. "The United States hereby cede to them [the tribe] and their heirs forever a certain tract of land"—(a large tract:) "*Provided*, Said tribe shall never sell said land without the consent of the President of the United States."

This was no fee. The act of 1802 prohibited them from selling a fee. The treaty only referred to a cession for Indian occupancy.

4. Chippewa, &c., July 29, 1829, 7 Stat., 321, art. III.

5. Seneca, February 28, 1831, 7 Stat., 348, art. II.

This was in pursuance of act of 28th May, 1830.

II.

Reservations and grants to individuals not in fee.

This class of titles was considered in *Gaines* v. *Nicholson*, (9 Howard, 356,) under the Choctaw treaty of September 28, 1830. (7 Stat., 382.)

The court say:

"The reservation was so much carved out of the territory ceded, and remained to the occupant as he had never parted with it. He holds, strictly speaking, not under the treaty of cession, but under his original title, confirmed by the Government in agreeing to the reservation." (See act August 23, 1842, to execute treaty, 1 Lester, 73.)

And in *Doe* v. *Wilson*, (23 Howard, 463,) it was said:

"The reservees took by the treaty directly from the nation the Indian title, * * to which the United States title was either added or to be added." (See Creers v. Burcham, 1 Black R., 352.)

It could "*be added*" by act of Congress.

The treaty in this case did not pretend to reserve a *fee*.

And similar reservations made by treaty of October 26, 1832, were subsequently ceded to the United States by treaty of December 4 and 10, 1835.

Such reservations have never been understood to *convey a title*. (See act March 9, 1848; 1 Lester, 133, as to reservations in Pottawatomie treaty, October 20, 1832.)

1. Cherokee, January 7, 1806, (7 Stat., 102,) is the *first reservation to individuals*. (See this referred to above. See Chippewa treaty, September 26, 1833, (7 Stat. 433,) art. V; Ib. 451.)

2. Creek, August 9, 1814, (7 Stat., 121,) reserves to individual Indians and descendants only "so long as they occupy," and then to revert to the United States.

3. Kansas, June 3, 1825, (7 Stat., 245,) reservation to individuals not in fee; ratified by act of May 26, 1860. (10 Opinions, 509.)

4. Osage, June 2, 1825, (7 Stat., 241,) from lands ceded by Indians to the United States the treaty reserves, "for the use of the half-breeds," named specified tracts.

5. Chippewa, September 24, 1819, (7 Stat., 203,) cedes lands

to United States, and then, "from the cession aforesaid, the following tracts of land shall be reserved for the use of the Chippewa nation of Indians: one tract of 8,000 acres, &c. * * Art 3. There shall be reserved for *the use* of each of the persons hereinafter mentioned, and their heirs, all Indians by descent, the following tracts, for the use of Peter Riley," &c., &c. This evidently only contemplated a use, not a fee.

6. Quapaw, November 15, 1824, 7 Stat., 233, art VII.

7. Choctaw, Sup., September 28, 1830, 7 Stat., 340, art II.

8. Potawatamie, October 20, 1832, 7 Stat., 378, art II.

9. Chickasaw, October 20, 1832, 7 Stat., 382, art IV. (Ib. 451.)

See Chippewa, September 26, 1833, 7 Stat., 433.

III.

Stipulation for grants in fee, but requiring acts of Congress to execute them.

In *Foster & Elam* v. *Neilson*, (2 Peters, 253,) a question arose as to the proprietorship of certain land.

Chief Justice Marshall said:

"Do these words act directly on the grants, so as to give validity to those not otherwise valid, or do they pledge the faith of the United States to pass acts which shall ratify and confirm them?

A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect of itself the object to be accomplished, especially so far as its operation is infraterritorial, but is carried into execution by the sovereign power of the respective parties to the instrument

"In the United States a different principle is established. (But see Annals of Congress for 1796, p. 525; Federalist, No. 52, p. 63; 1 Benton Abr., 643.) Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department, and the legislature must execute the contract before it can become a rule for the court. The article does not declare that all grants shall be valid It does not say that these grants are hereby confirmed. Had such been its language, it would have acted directly on the subject," &c.

Now, within the principle so announced, treaties were made *stipulating for the conveyance of a fee simple*, and of course requiring the authority of an act of Congress to execute them.

The first of these was the Cherokee treaty of July 8, 1817. (7 Stat., 159.)

Some of the treaties of this class are:

I. Cherokee treaty, July 8, 1817, (7 Stat., 159, art. VIII.)

This treaty was made under the act of March 26, 1804, (2 Stat., 289,) and provides for removal of Cherokees west of the Mississippi. But "to every head of an Indian family residing on the east side of the Mississippi * * who may wish to become citizens of the United States, the United States do *agree* to give a reservation of 640 acres, * * in which they will have a life estate, with a reservation in fee simple for their children. * * If any of the heads of families * * remove, [from reservations,] the right to revert to the United States."

As the act of March 30, 1802, (2 Stat., 141,) was in force, they could not create a fee, and the case in 2 Pet., 253, shows that legislation was required. In this and other treaties it is apparent that legislation is required to authorize a survey to identify and mark out lands.

II. Wyandot, September 29, 1817, 7 Stat., 162, 163. Sup. treaty, September 17, 1818, 7 Stat., 178.

The treaty says, "the United States agree to grant, by treaty, in fee simple to" individuals named.

July 30, 1824, patent issued to Nancy Stewart, for land in Logan county, Ohio, under art. VIII of treaty of 1817.

III. Potawatamie, October 2, 1818, 7 Stat., 185.

IV. Wea, October 2, 1818, 7 Stat., 187.

V. Delaware, October 3, 1818, 7 Stat., 188.

VI. Miami, January 5, 1819, 7 Stat., 190.

VII. Choctaw, October 18, 1820, 7 Stat., 211.

See Choctaw, January 20,1825, 7 Stat., 235.

See No. XVII, *post.*

This gives no fee. The treaty of 1825, says:

"It is *agreed* that all who have reservations shall have power, with the consent of the President, to sell and convey the same in fee simple. It is *agreed* that Choctaws, * * (four in number,) shall, * * and the right is given to select each a mile

square, and the right to sell and convey the same with the President in fee simple is granted."

VIII. Ottawa, August 29, 1821, 7 Stat., 218, art. III.

Lands are "stipulated to be granted," art. III.

Florida, September 18, 1823, 7 Stat., 225, art. X.

"*Requests* that one mile square [designated] be conveyed in fee simple to G. Humphreys."

IX. Quapaw, November 15, 1824, 7 Stat., 233.

"There shall be granted by the United States to" persons named specified tracts.

By art. VI it is provided, "from the cession aforesaid there shall be reserved to James Scull, in consideration of a debt due him from the Quapaws, two sections, [designated.] The United States guarantee the payment of said debt either by ratification [by Congress] of this grant, or by the payment of said debt."

X. Chippewa, August 5, 1826, 7 Stat., 291, art. IV.

Half-breeds to have lands selected, and may sell with consent of the President.

XI. Pottawatomie, October 16, 1826. 7 Stat., 297.

"The United States agree to grant" to individuals lands to be located by the President.

XII. Miami, October 23, 1826, 7 Stat., 301.

XIII. Cherokee, February 27, 1819, 7 Stat., 195, says:

"It is understood and *agreed* by the contracting parties, that a reservation in fee simple of 640 acres square * * shall be made to each of the persons on the list annexed."

The same article then says: "In addition to the above reservations, the following are made in fee simple to Calbia Smith," &c., &c.

But this is evidently designed only as an agreement.

Art. 4 "stipulates" for sale of certain lands.

XIV. Potowatomie, September 20, 1828, 7 Stat., 318, art. III.

XV. Winnebago, August 1, 1829, 7 Stat., 324, art. V.

XVI. Chippewa, &c., July 29, 1829, 7 Stat., 320, art. IV.

XVII. Choctaw, September 27, 1830, 7 Stat., 335, arts. XIV, XV, XIX. (See No. VII, ante.)

This was under act May 28, 1830.

XVIII. Seneca, February 28, 1831, 7 Stat., 350.

XIX. Creek, March 24, 1832, 7 Stat., 366, art. IV—under act May 28, 1830.

Certain Creeks "shall receive patents in fee simple" after five years' residence."

XX. Winnebago, September 15, 1832, 7 Stat., 372, art. X:

"The United States agree to grant by patent in fee simple to persons" named "lands to be designatod by the President."

XXI. Sac and Fox, September 21, 1832, 7 Stat., 375, art. VI.

"United States agree to grant by patent in fee simple A. C. one section."

XXII. Chickasaw Supp., October 27, 1832, 7 Stat., 389.

XXIII. Potawatomies, October 27, 1832, 7 Stat., 400.

XXIV. Ottawa, February 18, 1833, 7 Stat., 421, art. II.

"It is agreed that out of the lands ceded * * reservations shall be made and patents for each tract shall be granted by the United States to the individuals respectively, and their heirs," &c.

XXV. Miami, October 23, 1834, 7 Stat., 459, art. IV. *Ib.*, 464.

"It is agreed * * that a patent in fee simple shall be issued to J. B. R."

"From the cessions made * * there shall be granted."

XXVI. Caddo, July 1, 1835, 7 Stat., 472.

XXVII. Pottawatomy, June 4, 1836, 7 Stat., 490, art. VI, *not* ratified.

XXVIII. Miami, November 6, 1838, 7 Stat., 571, art. XII.

LANDS CEDED TO THE UNITED STATES IN TRUST TO SELL AND RAISE FUNDS, OR STIPULATING FOR SALE OF LANDS, BUT REQUIRING LEGISLATION TO EXECUTE IT—CONTRACTS MERELY—NOT OPERATIVE PER SE.

I. Cherokee, February 27, 1819, 7 Stat., 195, cedes to United States Indian lands in Alabama, and then says certain parts "are ceded to the United States in trust for the Chero-

kee nation as a school fund, to be sold by the United States, and the proceeds vested as provided in article IV." Then article IV says: "The United States stipulate that the reservations and the tract reserved for a school fund in the first article, shall be surveyed and sold in the same manner and on the same terms with the public lands of the United States, and the proceeds vested under the direction of the President in the stock of the United States, or such other stock as he may deem," &c.

II. Osage, June 2, 1825, 7 Stat., 242, cedes Indian lands to the United States, and then says: "From the above lands ceded and relinquished, the following reservations for the use of the half-breeds hereafter named, to wit: one section for A. Clermant, to be located," &c., &c. "And also 54 other tracts of a mile square each, to be laid off under the direction of the President, * * and sold for the purpose of raising a fund to be applied to the support of schools for * * Osage children."

III. Delaware Supp., September 24, 1829, 7 Stat., 327.

IV. Seneca, February 28, 1831, 7 Stat., 348, art. VIII.

"The United States will expose to public sale * * as the President may direct, * * and after deducting, &c., it is agreed the balance * * shall constitute a fund," &c.

See Seneca and Shawnee, July 20, 1831, 7 Stat., 352, art. VIII.

V. Shawnee, August 8, 1831, 7 Stat., 357, art. VII.

The preamble recites appointment of commissioner under act 28th May, 1830.

VI. Ottawa, August 30, 1831, 7 Stat., 361, arts. VII, XII:

"The lands ceded shall be sold."

VII. Wyandott, January 19, 1832, 7 Stat., 364, art. II:

"The United States stipulate * * that the land shall be sold."

"The United States agree to pay for improvements."

VIII. Chickasaw, October 20, 1832, 7 Stat., 382, art. II; *Ib.* 388, art. VI, also provides for the establishment of a land office, and the appointment of officers to make sale of lands.

Chickasaw, May 24, 1834, 7 Stat., 451.

IX. Wyandot, April 23, 1836, 7 Stat., 502. This requires land to be sold, and register and receiver to be appointed.

X. Chippewa, May 25, 1836, 7 Stat., 504; January 14, 1837, 7 Stat., 529.

TREATIES MADE UNDER ACT OF CONGRESS OF MAY 28, 1830.

I. Cherokee, February 14, 1833, 7 Stat., 414; *id.* December 29, 1835, 7 Stat., 478, 488.

II. Creek, February 14, 1833, 7 Stat., 419, arts. II, III.

III. Quapaw, May 13, 1833, 7 Stat., 425, sec. 2.

IV. New York Indians, January 15, 1838, 7 Stat., 551, art. II.

V. Chippewa, January 23, 1838, 7 Stat., 565.

VI. Shawnee, April 8, 1831, 7 Stat., 356, art. II.

"The United States will grant by patent, in fee simple, to them (tribe of Shawnees) and their heirs forever, as long as they shall exist as a nation and remain upon the same."

VII. Seneca, February 28, 1831, 7 Stat., 349, art. II.

VIII. Seneca and Shawnee, July 20, 1831, 7 Stat., 352, art. II.

IX. Seneca and Shawnee, December 29, 1832, 7 Stat., 411, art. II.

X. Ottowa, August 30, 1831, 7 Stat., 361:

"The United States will grant to said band (of Indians) by patent, in fee simple, 40,000 acres west of the Mississippi."

V.

TREATY GRANTS IN FEE SIMPLE IN FORM, OPERATIVE PER SE.

I. Seneca, February 28, 1831, 7 Stat., 350, art. XI:

"A quarter section is hereby granted to him (Henry C. Brish) and his heirs, to be located under the direction of the President."

II. Shawnee, July 20, 1831, 7 Stat., 351.

"There is granted to James McPherson one-half section of land, * * as he may select," in Ohio, &c.

The preamble refers to act of May 28, 1830.

On 1st May, 1833, the Commissioner of the General Land Office issued a *certificate* to McPherson that the President had designated section 1, T. 7 S., R. 8 E., for him, &c., in Logan county, Ohio.

III. Chippewa, &c., September 26, 1833, 7 Stat., 433, art. V.

"All the individual reservations in the treaty of October 20, 1832, shall be considered as grants in fee simple."

IV. Chickasaw, May 24, 1834, 7 Stat., 451.

Appendix B.

Post Office Department,
Office of Foreign Mails,
Washington, D. C., *April* 10, 1872.

Sir: I have the honor to inform you, in reply to your letter of this date, that all the postal treaties or conventions concluded between the United States and foreign countries since 1852, have been negotiated and concluded directly by the Postmaster General, with the respective foreign Post Departments or governments, with the advice and consent of the President of the United States, and without ratification by the Senate; under the authority given by the act of March 3, 1851, (9 U. S. Stat., 589,) and subsequently affirmed by the 4th section of the act of March 9, 1868, (15 Stat., 40.) (See also sec. 6, act August 31, 1852, 10 Stat., 141.)

These postal treaties or arrangements not only establish rates of international postage on all kinds of correspondence exchanged in the mails with other countries, but regulate the manner of conducting such exchange, with the necessary forms of accounts, &c. The detailed regulations form a necessary part of the postal treaties, and are, in like manner, arranged and concluded directly between this department and the postal administrations of foreign countries. These treaties or conventions, with the detailed regulations appertaining thereto, *are carried into operation without action on the part of Con-*

gress, they having full force and effect in all respects, by virtue of the acts above referred to.

Prior to the act of March 3, 1851, only one postal convention existed between the United States and any foreign government, viz: that of December 15, 1848, with Great Britain. (9 Stat., 965.) This was carried into effect by an act of March 3, 1849. (9 Stat. 379.)

I am, very respectfully, your obedient servant,

JOSEPH H. BLACKFAN,
Superintendent.

Hon. WM. LAWRENCE,
Ex. M. C. 4th Ohio Dist.,
Washington, D. C.

RESPONDENTS BRIEF.

In the Supreme Court of the United States.

No. 360.

PETER F. HOLDEN, Appellant,

VS.

JAMES F. JOY, Respondent.

Appeal from the Circuit Court of the United States for the District of Kansas.

POWELL, GINCK & CO., 630, 632 F Street.

In the Supreme Court of the United States.

No. 360.

PETER F. HOLDEN, Appellant,

VS.

JAMES F. JOY, Respondent.

Appeal from the Circuit Court of the United States for the District of Kansas.

RESPONDENTS BRIEF.

POWELL, GINCK & CO., 630, 632 F Street.



In the Supreme Court of the United States.

DECEMBER TERM, A. D. 1871.

PETER F. HOLDEN, APPELLANT,

vs.

JAMES F. JOY, RESPONDENT.

Appeal from the Circuit Court of the United States for the District of Kansas.

This is a suit in equity, to enjoin defendant from prosecuting an action of ejectment, for the possession of a certain quarter section of land in the State of Kansas, and to quiet the title of complainant, and for other and further relief.

The petition states that the defendant claims title to the land in suit, under the pretended authority of the 17th article of the pretended treaty made between the United States and the Cherokee Nation or tribe of Indians, in the year 1866, and the supplemental article therete, proclaimed in the year 1868. That at the time of the making of said treaties, and for a period long prior thereto, the Cherokee tribe of Indians had ceased to occupy the lands mentioned and described in said treaties, and had abandoned said lands, by reason whereof the title of the said tribe of Indians had then, and had long prior thereto, reverted to the United States. The petition further charges that on the 30th day of August, 1866, one James

Harlan, then Secretary of the Interior, fraudulently conspired with the officers and members of the American Emigrant Company, a corporation under the laws of the State of Connecticut, to sell 800,000 acres of said land to said Company, in violation of the terms of said treaty of 1866, for the purpose of defrauding said Cherokee Indians, and preventing the same, being settled upon and purchased under the pre-emption laws of the United States. The petitioner next charges, that before the said treaty of 1866 was made, the said Indians had made a treaty, offensive and defensive, with the so called Confederate States of America, by which said Indians abandoned their occupation of said land, and ceded it to the said Confederate States for the sum of $500,000. The petition then charges, that defendant procured an assignment of said contract between the Secretary of the Interior and said Emigrant Company, to himself; and that, afterwards, on the 8th day of June, 1868, defendant entered into another contract with Mr. Browning, the then Secretary of the Interior, by which it was stipulated, that defendant was to purchase said lands according to said contract, made with Secretary Harlan, and assigned to the defendant, subject to slight modifications, in respect to the time of payments, which fully appear in said contract; and the substance of said contract is embraced in a treaty made between the United States and the Cherokee Nation or tribe of Indians, proclaimed June 10, 1868, and the patent to said land was issued to defendant, under this last-mentioned treaty.

The petition further states, that the land in suit is a part of the 800,000 acres conveyed to the Cherokee Indians by patent dated December 28, 1838, issued by the President of the United States in due form, and that such patent was issued under the authority of a treaty made with the Cherokee Nation or tribe of Indians on the 19th day of December, 1835. It is also stated in said petition,

that there was no authority to issue a patent to defendant for the land in suit, except such as is to be found in the patents, treaties, and contracts before mentioned. The petition then alleges, that on the 5th day of November, 1869, the land in suit was public land of the United States, to which the Indian title had before that time been extinguished, and that complainant having the necessary qualifications of a pre-emptor, then, and on that day, made a settlement in person upon said land, and took possession of the same, and has fully complied with the pre-emption laws of the United States; that complainant made valuable improvements upon said land; that said improvements are worth twenty-five hundred dollars, and that the land itself, without the improvements, is also worth twenty-five hundred dollars. The petition next states, that there was no public survey of said land until the 8th day of June, 1867, and that no plat or survey of said land has ever been returned to the office of the register and receiver of the land district in which said land is situated, or to the office of the surveyor general, and that the only record of said survey is in the office of the Commissioner of the General Land Office at Washington city, and that no instructions have ever been given to said register and receiver respecting said land by the Secretary of the Interior. The petition avers that complainant has always been ready and willing to make proof of his said settlement and improvement on said land before said register and receiver, and to pay therefor the price of $1 25 per acre, and has tendered such proof and payment, but the same has been refused. The complainant offers in his petition to make such proof, before any person authorized by law to receive the same, and to tender said proof to said register and receiver, and to the Government of the United States. Complainant also tenders in his petition the sum of two hundred dollars ($200) as the price

of said land. The petition sets up, that by reason of said settlement and improvement, the right has accrued to complainant to enter said land and pre-empt the same under the laws of the United States. The petition charges, in conclusion, that defendant has commenced an action of ejectment against complainant in the Circuit Court of the United States for the district of Kansas, to eject com plainant from said land. That in said action complainant cannot set up his equitable title, and therefore he prays that defendant may be enjoined from the further prosecution of said suit; that complainant may be quieted in his title to said premises, and for other and further relief.

The defendant demurred to said petition.

1. Because the facts set forth in said petition do not constitute any cause of action against defendant.

2. Because the facts set forth in said petition are not sufficient to entitle complainant to any relief in a court of equity, for want of equity in said petition.

3. Because said petition shows that complainant has a full and adequate remedy at law.

The court sustained the demurrer, and complainant, electing to stand on the demurrer, final judgment was rendered in favor of defendant, and complainant brings the case here by appeal.

Points and Authorities for Respondent.

The Respondent will rely upon the following points and authorities:

1. The Cherokee Nation of Indians is a State, with which treaties may be made by the President and Senate of the United States. The Cherokee Nation against Georgia, 5th Peters, 15; Worcester against State of Georgia, 6th Peters, 581, 582.

2. We have made treaties with Indians ever since we have had a Government. By entering into those

treaties, we have admitted the power of these people to bind themselves, and to impose obligations upon us. After the lapse of more than three-quarters of a century, since treaties with the Indians have been solemnly ratified by the general government, it is too late to deny their binding force. Worcester against the State of Georgia, 6 Peters, 581, 582.

3. The power to make treaties is given by the Constitution in general terms, without any description of the objects intended to be embraced by it, and consequently, it was intended to extend to all those subjects which in the intercourse of nations had usually been the subjects of negotiation and treaty; and which are consistent with the nature of our government, and the distribution of powers between the general and State governments. Holmes *vs.* Jennison and others, 14 Peters, 569; 1st Kent's Com., 165 and 166; Story on the Constitution, sec. 1508; Annals of Congress, 14th Congress, 1st session, 1815 and 1816, pages 489, 526, 564 and 639; Works of Hamilton, vol. 7, pages 501 to 528; Annals of Congress, 4th Congress, 1st session, 1795, 1796, page 760; Calhoun's works, vol. 1, p. 202; 5 Cal., 384; Duer's Constitutional Jurisprudence, pages 228 *et seq.;* 2 Yerger, 439.

4. There is nothing in the Constitution which prohibits the treaty-making power to dispose of the property of the United States, either by a treaty with foreign nations or Indian tribes. The power given to Congress to dispose of the territory or other property of the United States, is not a limitation on the treaty-making power. The power of Congress is a power to make laws to be executed municipally, without consultation or agreement with foreign nations or Indian tribes. Congress cannot dispose of our territory by a compact with a foreign nation, because that would be to make a treaty, and Congress cannot make a treaty. When, therefore, the Presi-

dent and Senate dispose of property of the United States by contract with foreign nations or Indian tribes, they are not invading any power of Congress; they do not legislate, they make a treaty.

5. The land in suit was not subject to the pre-emption laws when complainant settled upon it. The pre-emption laws did not extend to it, and even if they did, the treaties of 1866 and 1868 provide a mode of disposing of said lands, inconsistent with the right of pre-emption; and to that extent supercede the pre-emption law under which the complainant claims, the treaty being subsequent to the law. It is true that the effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution, but the question is not involved in any doubt as to its proper solution. A treaty supercedes or repeals all prior acts of Congress which are repugnant to it. Foster and Elam *vs.* Neilson, 2 Peters, 314; Cherokee Tobacco, 11 Wallace, 621.

6. A treaty may convey to the grantee a good title to lands belonging to the United States. Such title is valid without an act of Congress confirming it; and not only is this so, but Congress has no constitutional power to settle or interfere with rights under treaties, except in cases purely political. 6 Wallace, 89; 23 Howard, 457; 9 Peters, 711; 10 Howard, 442; 5 Wallace, 737; 6 Peters, 558; 1 Black, 355; 4 Howard, (Miss.,) 559; 4 Blackford, 371; 2 Yerger, 439; 4 McLean, 418; 1 Kansas, 394; 2 Kansas, 198, 224, 225; Parker *vs.* Winsor, 5 Kansas, 367, 368.

7. The treaties under which defendant claims title, and which are referred to in complainant's petition, have been sanctioned by acts of Congress. The treaty of 1835 with the Cherokees was recognized as valid by the act entitled "An act making further appropriations for carrying into effect certain Indian treaties," approved July 2, 1836.

The treaties of 1866 and 1868 were recognized as valid, and the provisions therein contained for the sale of the Cherokee neutral lands were sanctioned by section 4 of the Indian appropriation bill, which was approved July 27, 1868. Vol. 5, U. S. Statutes at Large, 73; Vol. 16, U. S. Statutes at Large, 359. In fact, an act of Congress of date March 3, 1863, authorized the President of the United States to enter into treaties with the Indians of Kansas for the extinguishment of the Indian titles to the land claimed by them. Vol. 12, U. S. Statutes at Large, 793. See also Kansas-Nebraska act, vol. 10, U. S. Statutes at Large, 283, 284.

8. The land in suit did not belong to the United States at the time the treaties of 1866 and 1868 were made. It was granted to the Cherokees in fee simple by patent, in 1838, issued by the President of the United States in accordance with the provisions of the treaty of 1835.

9. If there is a condition or proviso in the patent of 1838 reducing the estate of the Cherokee Indians, in the lands thereby conveyed to less than a fee, that condition or proviso is a nullity, it being in violation of the terms of the treaty under which it was issued. A condition in violation of law is void, and the estate of the grantee becomes absolute—article 2, treaty with the Cherokees of 1835, vol. 7, U. S. Stat. at Large, 480; 4 Kent's Com., 130.

10. The allegations in complainant's petition in reference to the abandonment by the Cherokees of the land in suit, are entitled to no weight. They are based upon a proviso in the patent of 1838, which stipulates that said land shall revert to the United States, if the Cherokee nation abandons the same. This is a condition subsequent, which no one but the grantee can take advantage of. 4 Kent's Com., 127; Kennett *vs.* Plummer, 28 Mo., 145; Cooper *vs.* Roberts, 18 Howard, 181. Moreover this condition was waived by treaties of 1866 and 1868.

11. There is nothing in the position that the sale to the defendant is void, for the reason he purchased only a portion of the lands described in the treaty of 1866 at one dollar per acre, while the treaty itself did not authorize a sale of any less than the whole of said lands at that price. The contract of defendant was ratified in express terms by the supplemental treaty of 1868, and his patent was issued under and by virtue of the last mentioned treaty.

12. To say that the treaties of 1866 and 1868 authorized the sale of nothing but the right of the Indians to occupy the land described in said treaties, and that by the very sale itself that right was destroyed, would be to make the President and Senate parties to a gross fraud, and would do violence to the plain meaning of language.

RESPONDENT'S BRIEF.

The material facts in this case, as stated in the pleadings and as gathered from the treaties and laws of the United States, and the public history of the country, are as follows:

In the year 1830, in pursuance of what was considered sound public policy, Congress passed an act entitled, "An act to provide for an exchange of lands with the Indians, residing in any of the States or Territories, and for their removal west of the Mississippi river." This act was approved May 28, 1830, see vol. 5, U. S. Statutes at Large, 411 and 412. The 1st and 2d sections of the act authorized the President of the United States to exchange certain lands west of the Mississippi river with any tribe or nation of Indians residing within the limits of any of the States or Territories, and with which the United States had existing treaties, for the whole or any portion of the territory claimed or occupied by such Indians. The third section of the act is in these words:

"SEC. 3. And be it further enacted, that in the making

of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them and their heirs or successors, the country so exchanged with them, and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same, provided always that such lands shall revert to the United States if the Indians become extinct or abandon the same."

Afterwards, while this act was in full force, the President of the United States negotiated a treaty with the Cherokees, under which the Cherokees exchanged certain lands claimed by them for certain lands of the United States. This treaty was ratified December 29th, 1835, and is referred to and made a part of the petition in this case.

That treaty contained among other, the following provisions. By article 1st the Cherokee Nation cede, relinquish and convey to the United States, all lands owned, claimed or possessed by them, east of the Mississippi river, and release all claims upon the United States for spoliation of every kind, for and in considerrtion of the sum of five million of dollars, ($5,000,000).

Article 2d recites: That whereas the treaty of May 6, 1828, and the supplementary treaty of 1833 with the Cherokees west of the Mississippi river, the United States guarranteed and secured to be conveyed by patent to the Cherokee Nation the following tract of land (a track containing seven million of acres), and further reciting: that whereas it is apprehended by the Cherokees, that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation when removed west of the Mississippi, "The United States, in consideration of the sum of five hundred thousand dollars ($500,000), therefor, hereby covenant and agree to convey to said

Indians and their descendants, by patent in fee simple, the following additional tract of land, situated between the west line of the State of Missouri and the Osage reservations, beginning at the southeast corner of the same and running north along the east line of the Osage lands, fifty miles to the northeast corner thereof, thence east to the west line of the State of Missouri, thence with the said line south fifty miles, thence west to the place of beginning, estimated to contain 800,000 acres !" This tract has since been familiarly known as the Cherokee neutral land, and is admitted by the petition in this case to include the land in suit. The terms of the article just quoted differ it will be perceived from the 3d section of the act of 1830. That section provides, that the United States shall guarantee to the Indians certain lands, with a proviso, that said lands shall revert to the United States, if the Indians become extinct or abandon the same. The treaty of 1835, however, expressly stipulates, that the 800,000 acre tract therein described, shall be conveyed to the Indians by patent in fee simple, without any proviso or condition whatsoever.

The treaty of 1835 thus made has been repeatedly recognized as valid and in full force by the Congress of the United States. It was so recognized by act entitled "An Act making further appropriations for carrying into effect certain Indian treaties," approved July 2d, 1836, in these words: "For the amount stipulated to be paid for the lands ceded in the first article of the treaty with the Cherokees of the 29th of December, one thousand eight hundred and thirty-five, deducting the cost of the land to be procured for them west of the Mississippi river, under the 2d article of said treaty, four million five hundred thousand dollars, ($4,500,000)." Vol. 5, U. S. Stat. at Large, 73. For similar recognitions of the validity of the treaty of 1835 by Congress, see vol. 10, U. S. Statutes at Large, 673, 687, vol. 11, ib., 80.

In 1838, the President of the United States, issued a patent conveying the 800,000 acres of land described in the treaties of 1835 to the Cherokee Indians, under and by virtue of said treaty, which had been approved by the act of July 2d, 1836, as before stated , that patent purports to convey to the Indians said lands in fee simple ; provided said lands shall revert to the United States if the Indians become extinct or abandon the same.

On the breaking out of the late civil war, the Cherokee Indians very generally favored the rebellion, until the fall of 1862, when a majority of the nation joined the Federal side, and two regiments of these people, numbering 2,200 men, deserted from the enemy and fought for the Government until the cessation of hostilities. See report of the Secretary of the Interior, 1865, 1866, page 206.

This conduct on the part of the Cherokees might posisibly have justified the United States authorities in declaring all treaties with said Indians abrogated. This, however, was not done. On the contrary, Congress, by act entitled "An Act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and sixty-three," approved July 5, 1862, recognizes the treaties with the Indians as in full force, but provides, "that in cases where the tribal organization of any Indian tribe shall be in actual hostility to the United States, the President is hereby authorized to declare all treaties with such tribe to be abrogated by such tribe, if, in his opinion, the same can be done consistently with good faith, and legal and national obligations." Vol. 12, U. S. Statutes at Large, 528. This power thus entrusted to the President, he did not use, and the treaties with the Cherokee Indians remained in force, notwithstanding the rebellion.

By act of Congress, entitled An Act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and sixty-four, approved March 3, 1863, the President of the United States was authorized to enter into negotiations with various Indian tribes for the purchase of the lands occupied by them in the State of Kansas.

The fourth section of such act is as follows:

"SECTION 4. And be it further enacted, that the President of the United States be, and he is hereby, authorized to enter into treaties with the several tribes of Indians respectively, now residing in the State of Kansas, providing for the extinction of their titles to lands held in common, within said State, and for the removal of such Indians of said tribes as hold their lands in common, to suitable localities elsewhere within the territorial limits of the United States, and outside the limits of any State."

See vol. 12, U. S. Statutes at Large, 793.

After the close of the civil war, the act of March 3, 1863, being still in force, the President of the United States entered into negotiations with the Cherokee Indians for that part of their land situate in the State of Kansas. The result of such negotiations was the treaty of 1866, which is referred to in complainant's petition. That treaty is voluminous and relates to many subjects. Article 17 of it provides this:

"The Cherokee Nation cedes in trust to the United States the parcel of land in the State of Kansas, which was sold to the Cherokees under provisions of the second article of the treaty of 1835, and also that strip of the land ceded to the Nation by the 4th article of said treaty, which is included in the State of Kansas, and the Cherokees consent that said land may be included in the limits

and jurisdiction of the said State. The lands herein ceded shall be surveyed as the public lands of the United States are surveyed under the direction of the Commissioner of the General Land Office, and shall be appraised by two disinterested persons, one to be designated by the Cherokee National Council, and one by the Secretary of the Interior, and in case of disagreement, by a third person to be mutually selected by the aforesaid appraisers The appraisement to be not less than an average of one dollar and a quarter per acre, exclusive of improvements.

"And the Secretary of the Interior shall from time to time, as such surveys and appraisements are approved by him, after due advertisement for sealed bids, sell such lands to the highest bidder for cash, in parcels not exceeding one hundred and sixty acres, and at not less than the appraised value, provided, that whenever there are improvements of the value of fifty dollars ($50) made on the land not being mineral, and owned and personally occupied by any person for agricultural purposes at the date of the signing hereof, such persons so owning and in person residing on such improvements, shall after due proof made under such regulations as the Secretary of the Interior may prescribe, be entitled to buy at the appraised value the smallest quantity of land in legal subdivisions, which will include his improvements, not exceeding in the aggregate one hundred and sixty acres, the expenses of the sale and improvement to be paid by the Secretary out of the proceeds of sale of said land. Provided that nothing in this article shall prevent the Secretary of the Interior from selling the whole of said lands not occupied by actual settlers at the date of the ratification of this treaty, not exceeding one hundred and sixty acres to each person entitled to pre-emption under the pre-emption laws of the United States, in a body, to any responsible party for cash, for a sum not less than one dollar per acre."

This treaty has been frequently recognized as valid by Congress.

It was recognized as valid by act entitled, "An act to supply deficiencies in the appropriation for the service of the fiscal year ending June 30, eighteen hundred and sixty-six, and for other purposes." Approved July 28, 1866, in these words: "To enable the Secretary of the Interior to pay the reasonable costs and expenses actually paid or incurred by the Delegates of the Southern Cherokees, in coming to, or going from Washington, and during their stay in, and about the negotiation of treaties of peace and amity with the Indian tribes, a sum not exceeding ten thousand dollars ($10,000). Provided, that said sum shall be refunded to the Treasury, from the proceeds of the sale of the Cherokee Neutral Lands in Kansas." Vol. 16, U. S. Statutes at Large, 326.

The treaty of 1866, with the Cherokees, was recognized as valid, also by the Indian appropriation act of that year, in these words: "For this amount, or so much thereof, as may be necessary to enable the Secretary of the Interior to cause a census of each tribe to be taken under the provisions of the twelfth article of the treaty of July nineteenth, eighteen hundred and sixty-six, $2,500.

"For provisions and clothing furnished the army under Ap-pothe-le-ha-la-le in the winter of 1862, per the 28th article of treaty of July 19, 1866, ten thousand dollars, ($10,000.")

"For pay of losses of property of missionaries or missionary societies, on account of the troops or agents of the United States, treaty July 19, 1866, 30th article, twenty thousand dollars, ($20,000.")

This treaty was also recognized as in full force by Indian appropriation act of 1867, vol. 14, U. S. Stat. at Large, 513; by the Indian appropriation act of 1870, vol. 16, U. S. Statutes at Large, 359, and by the Indian appro-

priation act of 1871, vol. 16, U. S. Statutes at Large, 569.

These acts not merely recognized the Cherokee treaty of 1866 as valid, but they appropriated in the aggregate eighty-four thousand eight hundred and twenty-five dollars ($84,825) to carry it into effect.

After the treaty of 1866 was ratified and proclaimed, Mr. Harlan, while Secretary of the Interior, made a contract for the sale of the Cherokee neutral lands to the American Emigrant Company. His successor in office, Mr. Browning, disapproved of the sale before it had been consumated, and contracted to sell the same lands to Mr. James F. Joy, the defendant in this suit. This matter attracted the attention of Congress. The House of Representatives accordingly on the 11th of December, 1867, passed a resolution calling on the Secretary of the Interior for information with regard to the sale of said land.

The Secretary of the Interior answered said inquiries as follows:

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, *January* 7, 1868.

SIR: On the 12th ultimo this Department received and referred to the Commissioner of Indian Affairs, for immediate report, a resolution of the House of Representatives of the 11th December, 1867, in the following words, viz:

Resolved, That the Secretary of the Interior be directed to inform this House whether the title to all Indian lands in the State of Kansas has been extinguished, or what part thereof; when the same was so extinguished; who purchased said lands; at what price; whether the sale thereof was publicly advertised, or in what manner were they disposed of; also, if any were sold by contract, to furnish copies of the same.

"I now transmit herewith a copy of the report of the Acting Commissioner of Indian Affairs on the subject,

dated the 4th instant, and the papers therein referred to.

"In respect to the sale of the Cherokee neutral lands, I deem it proper to remark, that by the terms of the treaty it is optional with the Secretary of the Interior to sell them in separate tracts, at not less than an average of $1 25 per acre, or in a body, at not less than $1 per acre.

"The provision of the treaty for the sale in separate tracts is that, after the lands shall have been surveyed, they shall be appraised at an average of not less than $1 25 per acre, exclusive of improvements, and, after advertising for sealed bids, shall be sold to the highest bidder for cash, in parcels not exceeding one hundred and sixty acres, (160,) and at not less than the appraised value.

"Another provision of the treaty authorizes the Secretary of the Interior to sell the whole of said lands, not occupied by actual settlers, in one body to any responsible party for cash for a sum not less than $1 per acre.

"The sale of separate parcels on sealed bids is subject to the disadvantages of requiring years of time, and of leaving all the refuse land in the hands of the Indians unsold. I did not doubt that an immediate sale in a body at $1 per acre would be greatly more to the interest of the Indians than a tardy sale of the choice lands in separate tracts at the appraised value, with the inferior lands left undisposed of for years, and have consequently been desirous to find a purchaser who would take them all, good and bad together, at $1 per acre.

"With this view, I suggested and urged at the last session of Congress that the United States should become the purchaser at $1 per acre, and issue bonds in payment thereof. Such a proposition was, I believe, submitted to Congress, but not accepted. After the adjournment of Congress I authorized an unofficial statement to be made in newspapers that proposals for the purchase of said lands in a body would be received at the Department until the

1st of October. Early in October Mr. James F. Joy, of Detroit, Michigan, proposed to take the lands in a body at $1 per acre, and pay the cash for them. No other offer was made. I accepted Mr. Joy's, and concluded a contract with him, from which all lands occupied by actual settlers at the date of the ratification of the treaty were excluded.

"A copy of the contract is herewith furnished. The money would have been paid by Mr. Joy, and the lands conveyed at the time of the contract, had the number of acres sold been known. But as all the lands occupied by actual settlers were excluded from the sale, it was necessary to ascertain the quantity thus occupied to determine how many acres remained to be paid for by Mr. Joy. Commissioners are now engaged in estimatiug and appraising the improved tracts. As soon as they shall have completed their labor and reported, the contract will be consummated by accepting the purchase money, and causing the land to be patented to the purchaser.

Very repectfully your ob't servant,

O. H. BROWNING,

Secretary.

Hon. SCHUYLER COLFAX,

Speaker of the House of Representatives.

After the sale of the Cherokee neutral lands to Mr. Joy, litigation became probable on account of the conflicting claims of himself and the American Emigrant Company. In order to avoid this litigation and for the purpose of enabling the Secretary of the Interior, as the trustee of the Cherokee Nation of Indians, to collect the proceeds of the sales of said lands, and invest them for the benefit of said Indians, a supplemental treaty was made between the United States and the Cherokees. This treaty refers to the sales to Mr. Joy and the Emigrant Company, and

the necessity of harmonizing conflicting interests, and directs the sale of said neutral lands to Mr. Joy upon the terms in said supplemental treaty set forth. This treaty was ratified June 6, 1868, and proclaimed June 10, 1868.

Afterwards with full knowledge of the sale of the Cherokee neutral land to Mr. Joy and of the provisions of the treaty of 1868, the Congress of the United States recognized said treaty as valid by the 4th section of the Indian appropriation law of July 27, 1868, as follows:

"And be it further enacted, that the sum of ten thousand three hundred and fifty-six ($10,356) dollars, to be appropriated from any money in the Treasury not otherwise appropriated, to enable the Secretary of the Interior to defray the expeneses ot the Cherokee delegation to Washington, District of Columbia, during the year 1867, provided that this sum be refunded to the Treasury of the United States out of that portion of the proceeds of the sale of the Cherokee neutral lands applicable to Cherokee national purposes." Vol. 16, U. S. Stat. at Large, p. 359.

Afterwards, by the Indian appropriation law of 1871, Congress recognized the validity of the treaty of 1868 and all other treaties ratified prior to the passage of said act, in the following terms:

"Provided that hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty, provided further that nothing herein contained shall be construed to invalidate or impair the obligations of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe." Vol. 16, U. S. Stat. at Large, p. 566.

After the treaty of 1868 was proclaimed in June, 1868, and recognized as valid by the act of July 27, 1868, Mr. Joy consummated his purchase of the Cherokee neutral

lands including the land in suit, and the same have been patented to him or his assignee.

At the time Mr. Joy's purchase was made, the Indian intercourse act expressly provided "that no purchase, grant, lease or other conveyance of lands, or of any title or claim thereto from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same shall be made by treaty or convention entered into pursuant to the Constitution. * * * The same act also provided that all monies received from the sale of lands, that have been or may be *hereafter* ceded to the United States by Indian tribes by treaties, providing for the investment or payment to the Indians, parties thereto of the proceeds of the lands ceded to them respectively, after deducting the expenses of survey and sale any sum stipulated to be advanced, and the expenses of fulfilling any engagement therein, shall be paid into the Treasury of the United States, in the same manner that monies received from the sale of public lands are paid into the Treasury.

"All sums that are or *may* be required to be invested by said treaties are hereby appropriated in conformity with them, and shall be drawn from the Treasury as other public monies are drawn therefrom, under such instructions as may from time to time be given by the President." Brightley's Digest, 1789, 1859, page 433, sec. 99; ib. 436, sec. 112 and 113.

The main question presented in this case, and the only one we shall discuss, is simply this: Is the title acquired by Mr. Joy, under the circumstances we have stated, valid? The complainant attacks this title on many grounds. We will consider his objections in their order.

In the first place it is said that a valid treaty cannot, under the Constitution of the United States, be made with an Indian tribe. Such treaties have been made under almost every administration we have had, including those

of Washington, Jefferson, and Madison. Our Indian treaties amount to several hundred in number. How happens it that all these invasions of the Constitution, if they were such, were never discovered until now, and that all departments of the Government, and all parties in the public councils, should have co-operated in giving them a sanction? But the best answer to this objection is to refer to the decisions of this court.

In 5th Wallace, 752, this court said: "The action of the political department of the Government settles beyond controversy that they (the Shawnees) are as yet a distinct people, with perfect tribal organization. While the Government continues to treat them as a nation, the State of Kansas is estopped from denying their title to it." And at page 755 of the same report this court said: "If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the Government as existing, then they are a people, distinct from others, capable of making treaties." In 5th Peters, 1, this court says, in speaking of the Cherokees: "They have been uniformly treated as a State from the settlement of our country. The numerous treaties made with them recognize them as a people responsible in their political character. Laws have been made in the spirit of these treaties. The acts of Government plainly recognize the Cherokee Nation as a State, and the courts are bound by those acts."

In the case of Worcester against the State of Georgia, 6 Peters, 560, Chief Justice Marshall, speaking for the court, said: "The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and

'nation' are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having each a definite and well-understood meaning. We have applied them to Indians as we have applied them to the other nations of the earth. They are applied to all in the same sense." The language of Judge McLean in the same case is equally emphatic: "It will scarcely be doubted by any one," says that distinguished jurist, "that so far as the Indians as distinct communities have formed a connection with the Federal Government by treaties, that such connection is political and is equally binding on both parties. This cannot be questioned, except upon the ground that in making these treaties the Federal Government has transcended the treaty-making power. Such an objection, it is true, has been stated, but it is one of modern invention which arises out of local circumstances, and is not only opposed to the uniform practice of the Government, but also to the letter and spirit of the Constitution." 6th Peters, 593.

It is next objected to the title of defendant, that the lands he claims were, at the date of the treaties of 1866 and 1868, public lands of the United States, and that a treaty cannot dispose of such property. We deny the correctness of both the propositions involved in this objection.

1. It is not true that the land in suit belonged to the United States when the treaties of 1866 and 1868 were made. The petition states that land to be a part of the 800,000 acres conveyed to the Cherokee Indians by patent, and that such patent was issued in accordance with the provisions of the Cherokee treaty of 1835. We have shown what the provisions of that treaty were so far as they affect the land in suit. We have shown that the Cherokees ceded to the United States all of their land east of the Mississippi river for the sum of five millions dollars

($5,000,000.) We have shown that by said treaty the United States agreed to convey to the Cherokee Indians in fee-simple absolute 800,000 acres of land, which include the land in suit, and which are now known as the Cherokee neutral lands. We have shown that Congress has repeatedly recognized said treaty as valid and binding upon the Government. We have shown that the President of the United States did, in pursuance of said treaty, in the year 1838, convey said lands by patent. We have shown that the Cherokees paid for said lands the sum of $500,000 in the following manner. A clause was inserted in the Indian appropriation act of 1836 in these words:

"For the amount stipulated to be paid for the lands ceded in the first article of the treaty with the Cherokees of December 29, 1835, deducting the cost of the land to be provided for them, west of the Mississippi river, under the 2d article of said treaty, $4,500,000."

The first article of the treaty provided for paying them $5,000,000, and they agreed to pay $500,000 for the 800,000 acres of land, to enlarge their home, and make it ample for the whole nation. The above clause of the act of Congress recognized the sale of the lands in fee simple to the Indians, and the price to be paid for it, deducts the price to be paid by them for it from the $5,000,000 to be paid by the government, and appropriates the balance, $4,500,000.

Here, then, we have a sale in fee simple by treaty, and that treaty approved by all branches of Congress and the government, the price of the land received by the government, and afterwards patents in fee simple made out to the Indian nation, and the transaction closed.

This was the condition of this title and this land until the treaties of 1866 and 1868.

There can be no doubt that from the time said patent issued, in 1838, to the Cherokees, the fee simple of this

land passed from the government, and was in the Indian Nation. It also became a part of the home of that Nation, and guaranteed to it against all unacceptable intruders, to remove whom it became the solemn duty of the government, as it now is to keep all such from their remaining lands. It has never, since that time, been a part of the public domain, open to pre-emption, homestead or other kind of settlement.

This was the state of the title when the treaties of 1866 and 1868 were concluded. The latter treaty had a special relation to the sale of the neutral lands to defendant, and it was by virtue of this treaty that the sale of these lands was made. The sale by the Indians could not have been made otherwise than by treaty, for such are the express provisions of the act of Congress to regulate trade and intercourse with the Indian tribes. See vol. 4, U. S. Stat. at Large, page 730.

Complainant, however, contends that the patent of 1838 did not vest the Cherokee Indians with a fee simple estate to the lands thereby conveyed, by reason of a condition in the patent, which provides that said lands shall revert to the United States in case the Indian tribe shall become extinct or shall abandon the same. The answer to this is obvious. If the patent does really contain a condition inconsistent with a fee in the Indians, that condition is void, for the reason that it is in violation of the terms of the treaty. All conditions in violation of law are void, and the estate of the grantee becomes absolute.

The complainant still further maintains, that by the terms of the patent of 1838, the lands therein embraced were to become the property of the United States whenever the Indians should abandon them, and that the pleadings in this case admit such abandonment. This position will avail the complainant nothing. The condition in the patent, if valid, is a condition subsequent,

and can be taken advantage of only by the United States, the grantor. 4 Kent's Com., 127; 28 Mo., 142, 145; 47 Mo., 108; Washb. Real Property, 450; Warner against Burnett, 21 Conn., 468.

Besides this, whatever forfeiture was incurred by the pretended treaty between the Cherokee Indians and the so-called Confederate States, was expressly waived by the treaty of 1866, and this forfeiture was also waived by the act making appropriations for the Indian Department, approved July 5th, 1862. This last mentioned act recognizes, as has been already stated, all our Indian treaties as in full force, notwithstanding the action taken by some of the Indian tribes in favor of the rebellion. See vol. 12, U. S. Statutes at Large, 528.

In point of fact then, the land in suit was not the property of the United States when the treaties of 1866 and 1868 were made. Hence the doctrince that a treaty cannot dispose of the territory of the United States, even if it be correct, has no application in this case.

2. But defendant insists that a treaty may alienate the public domain. The argument of complainant is, that under the Constitution, Congress has power to dispose of the territory of the United States, hence he concludes that this is an exclusive power, and that the treaty making power, cannot convey the property of the nation, nor authorize it to be conveyed. While the premises are manifestly right, the conclusion is manifestly wrong.

The power of Congress over the public property, like its power over other subjects, is legislative; it is the power to dispose of the property of the United States by legislative enactments. But it does not follow that because Congress has the power to dispose of the territory and other property of the nation by statute, that, therefore, the President and Senate may not dispose of the same property, in a proper case, by treaty. Congress may regulate

commerce by statute, but the President and Senate may adopt commercial regulations by treaty, where other nations are to be bound by them. Congress may pass naturalization laws, but the President and Senate may confer the rights and privileges of citizens upon foreigners by treaty, as has been always done when we have acquired foreign territory. In discussing this subject in the case of Canter against The American Insurance Company, 1st Peters, page 542, Chief Justice Marshall, said: "The sixth article of the treaty of cession contains the following provisions, 'the inhabitants of the territories which His Catholic Majesty cedes to the United States by this treaty, shall be incorporated in the Union, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of the privileges, rights and immunities of the citizens of the United States.' This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights and immunities of the citizens of the United States."

Congress has the power to lay and collect taxes, duties, imposts and excises, but the President and Senate may stipulate by treaty that certain articles of foreign production shall be admitted into our ports duty free. The proper construction of the clause of the Constitution in question, is not that Congress has the sole and exclusive power to dispose of the property of the United States, but it is that Congress has the sole and exclusive power to dispose of the property of the United States by law. The power, however, to make laws, and the power to make treaties, are different things. "They both may have the same subjects, but they discharge their functions in different ways."

The position of complainant, which we are now considering, if it mean anything, means this, that all sub-

jects upon which the legisiative power may act are excepted out of the treaty-making power, and are forbidden to it. Such a construction would destroy the treaty-making power altogether; for there is no subject within the practical range of the treaty-making power which our laws cannot either mould or qualify or influence.

Again, if it were true that a treaty could not act upon a subject which Congress may legislate upon, it would result that whenever a treaty conflicts with a prior law of Congress, the treaty would be null and void. But the true rule is directly the reverse. Whenever a treaty conflicts with a prior law, the treaty repeals so much of the law as is repugnant to it. The doctrine of this court, upon this subject, is expressed in these words: "The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any difficulty as to its proper solution. A treaty repeals all prior acts of Congress which are repugnant to it." 2 Peters, 314; 11 Wallace, 621. The extent of the treaty-making power, under our Constitution, should not, at this late day, be a matter of serious controversy. The power to make treaties is conferred in the most general and comprehensive terms upon the President and Senate, and would seem to invest them with the entire power on the subject of treaties which sovereign States may exercise according to the laws and usages of nations, except where it is restricted by specific prohibitions in the Constitution itself. The power is to make treaties without any words of limitation, and it is, therefore, as broad as the treaty-making power can be, according to the fundamental principles of our institutions. It covers the whole ground which it could be supposed the government would find it necessary or proper to occupy. It embraces all the treaties which it could be expected the government would have occasion to conclude in its intercourse with foreign

nations or Indian tribes, and, most certainly, in international negotiation, no subject is more common than the cesssion or acquisition of territory.

Upon this question, Judge Taney, in the case of Holmes *vs.* Jennison and others, 14 Peters, 569, uses this language: "The power to make treaties is given by the Constitution in general terms, without any description of the objects intended to be embraced by it, and consequently it was intended to extend to all those subjects which, in the ordinary intercourse of nations, had usually been the subject of negotiation and treaty, and which are consistent with the nature of our government and the distribution of powers between the General and State governments."

Judge Story, speaking of the treaty-making power under our Constitution, says:

"The power to make treaties is, by the Constitution, general, and, of course, embraces all sorts of treaties; for peace or war; for commerce or territory; for alliance or succor; for indemnity for injuries, or payment of debts; for the recognition and enforcement of principles of public law; and for any other purpose which the policy or interest of independent sovereignties may dictate in their intercourse with each other. But though the power is thus general, it is not to be allowed to destroy the fundamental law of the State." Story on the Con., sec. 1508.

Chancelor Kent uses this strong language: "There can be no doubt that the power to bind the nation by treaty, may alieniate the public domain and property by treaty." 1 Kent's Com., 166.

Alexander Hamilton, in his famous letters of Camillus, discusses with his usual ability, the extent and limits of the treaty-making power under our Constitution. He says:

"It was impossible for words more comprehensive to be used than those which grant the power to make treaties.

They are such as would naturally be employed to confer a plenipotentiary authority. The power to make treaties, granted in these indefinite terms, extends to all kinds of treaties, and with all the latitude which such a power under any form of government can possess—the power to make, implies a power to act authoritatively and conclusively, independent of the after clause, which expressly places treaties among the supreme laws of the land. The thing to be made is a treaty.

"With regard to the objects of the treaty, there being no specification, there is of course a carte-blanche. The general proposition must therefore be true, that whatever is a proper subject of compact between nation and nation may be embraced by a treaty between the President of the United States, with the advice and consent of the Senate, and the correspondent authority of a foreign state.

"The authority being general, it comprises whatever cannot be shown to be necessarily an exception to it.

"The only constitutional exception to the power of making treaties is, that it shall not change the Constitution, which results from this fundamental maxim, that a delegated authority cannot alter the constituting act, unless so expressly authorized by the constituting power. * * * Again, there is also a national exception to the power of making treaties, as there is to every other delegated power, which respects abuses of authority in palpable and extreme cases. On natural principles, a treaty which should manifestly betray or sacrifice the private interests of the State would be null. * * *

"Beyond these exceptions to the power, none occurs that can be supported. * * * *

"It is a question among some theoretical writers, whether a treaty can repeal pre-existing laws. This question must always be answered by the particular form of government of each nation. In our constitution which gives,

ipso facto, the force of law to treaties, making them equal to the acts of Congress, the supreme law of the land, a treaty must necessarily repeal antecedant law contrary to it, according to the legal maxim, that '*leges posteriories priores contrarios abrogant.*' * * * *

"The same reasoning applied to all other instances of supposed infraction of the legislative authority, with regard to piracies and offenses against the laws of nations, with regard to expenditures of money, with regard to the appointment of officers, with regard to the judiciary tribunals, with regard to *the disposal and regulation of the national territory and property.* In all these cases, the power to make laws, and the power to make treaties, are concurrent and co-ordinate. The latter, and not the former must act, where the co-operation of other nations is requisite. * * * * *

"So far then is it from being true, that the power of treaty can extend to nothing upon which, in relation to ourselves the legislative power may act, that it may rather be laid down as a general rule, that a treaty may do between different nations, whatever the legislative power of each may do with regard to itself. The exceptions to this rule are to be deduced from the unfitness and inconvenience of its application to particular cases, and are of the nature of abuses of a general principle." Hamilton's Works, vol. 7, page 505, 506, 512, 516, 517.

Mr. Calhoun, in his work entitled Disquisition on Govment, thus expresses himself, with regard to the treaty-making power:

"There is a very striking difference between the manner in which the treaty-making and the law-making power, in a strict sense, are delegated which deserves notice. The former is vested in the President and Senate by a few general words, without enumerating or specifying particularly the power delegated. * * * * *

But although the treaty making power is exclusively vested and without enumeration or specification in the Government of the United States, it is nevertheless subject to several important limitations.

"It is, in the first place, strictly limited to questions *inter alios;* that is, to questions between us and foreign powers, which require negotiation to adjust them. All such clearly appertain to it. But to extend the power beyond these, be the pretext what it may, would be to extend it beyond its alloted sphere, and thus a palpable violation of the Constitution. It is in the next place limited by all the provisions of the Constitution which inhibit certain acts from being done by the government or any of its departments, of which description there are many. It is also limited by such provisions as directs certain acts to be done in a particular way, and which prohibits the contrary; of which a striking example is to be found in that which declares that 'no money shall be drawn from the treasury but in consequence of appropriations to be made by law.' This not only imposes an important restriction upon the power, but gives to Congress, as the law-making power, and to the House of Represenatives as a portion of Congress, the right to withhold appropriations, and thereby an important control over the treaty-making power, whenever money is required to carry a treaty into effect, which is usually the case, especially in reference to those of much importance. There still remains another and more important limitation, but of a more general and indefinite character. It can enter into no stipulation calculated to change the character of the government, or to do that which can only be done by the constitution-making power, or which is inconsistent with the nature and strucure of the government, or the objects for which it was formed. Among which it seems to be settled, that it cannot change or alter the boundary of a State, or cede any portion of

its territory without its consent. Within these limits, all questions which may arise between us and other powers, be the subject-matter what it may, fall within the limits of the treaty-making power, and may be adjusted by it." Calhoun's Disquisition on Government, pages 202, 203 and 204.

Judge Duer, in his work on constitutional jurisprudence, uses this language:

"More general and extensive terms also are used in vesting the power with respect to treaties, than in conferring that relative to laws. And while the latter is laid under several restrictions, there are none imposed on the exercise of the former, notwithstanding that it is committed to the President and Senate in exclusion of the House of Represenatives, and is executed through the instrumentality of agents delegated for the purpose. And although the President and Senate are thus invested with this high and exclusive control over all those subjects of negotiation with foreign powers, which in their consequences may affect important domestic interests, yet it would have been impossible to have defined a power of this nature, and therefore only general terms were used. These general expressions, however, ought strictly to be confined to their legitimate signification, and in order to ascertain whether the execution of the treaty-making power can be supported in any given case, those principles of the Constitution from which the power proceeds, should carefully be applied to it. The power must indeed be construed in subordination to the Constitution, and, however in its operation it may qualify, it cannot supercede or interfere with any other of its fundamental provisions. Nor can it ever be so interpreted as to destroy other powers granted by that instrument. A treaty to change the organization of the government, or annihilate its sovereignty, or overturn its republican form, or to deprive it

of any of its constitutional powers, would be void, because it would defeat the will of the people which it was designed to fulfill.

"A treaty in its general sense is a compact entered into with a foreign power, and extends to all matters which are usually the subject of compact between independent nations. * * * It has been settled by the Supreme Court, that inasmuch as the Constitution declares a treaty to be the law of the land, it is to be so regarded in courts of justice, whenever it operates of itself without requiring the aid of any legislative provision. * * * The Constitution does not expressly declare whether treaties are to be held superior to the acts of Congress, or whether the laws are to be deemed co-equal with or superior to treaties; but the representation it holds forth to foreign powers is, that the President, by and with the advice and consent of the Senate, may bind the nation in all legitimate contracts, and if pre-existing laws contrary to a treaty could only be abrogated by Congress, this representation would be fallacious. It would subject the public faith to just imputation and reproach, and destroy all confidence in the national engagements. The immediate operation of a treaty must, therefore, be to overrule all existing laws incompatible with its stipulations. * * *

"That department of the government which is intrusted with the power of making treaties may bind the national faith at its discretion, for the treaty-making power must be co-extensive with the national exigencies, and necessarily involves in it every branch of the national sovereignty, of which the operation may be necessary to give effect to negotiations and compacts with foreign nations. If a nation have conferred on its executive department, without reserve, the right of treating and contracting with other sovereignties, it is considered as having invested it with all the power necessary to make a valid

contract, because that department is the organ of the government for the purpose, and its contracts are made by the deputed will of the nation. The fundamental laws of the state may withhold from it the power of alienating the public domain or other property belonging to it; but if there be no express provision of that kind, the inference is, that it has confided to the department charged with the duty and the power of making treaties, a discretion commensurate with all the great interests of the nation. * * *

"Now, a power to make treaties necessarily implies a power to settle the terms on which they shall be concluded, and foreign states could not deal safely with the government on any other presumption. That branch of the government which it entrusted thus largely and generally with authority to make valid treaties of peace can, of course, bind the nation by the alienation of part of its territory." Duer's Constitutional Jurisprudence, pages 228, 229, 230, 231, 232.

In the course of our history, numerous suits have sprung up involving the title to public lands granted to individuals by Indian treaties. It would be impossible in this paper to refer to all the decisions which have been made in such cases. A few of them only will be cited.

In Mitchell and others *vs.* The United States, 9 Peters, 745, this court said: "It was a universal rule that purchases made at Indian treaties, in the presence and with the approbation of the officer under whose direction they were held by the authority of the Crown, gave a valid title to the lands; it prevailed under the laws of the States after the revolution, and yet continues in them, where the right to the ultimate fee is owned by them or their grantees. It has been adopted by the United States, and purchases made at treaties held by their authority, have always been held good by the ratification of the

treaty, without any patent to the purchasers from the United States."

In Crews et al. *vs.* Burcham et al., the case was this: By the treaty of 1832 the Pottawotamie Indians ceded to the United States all their lands in Illinois, Indiana and Michigan, south of Grand river, and by the same treaty the United States agreed to grant certain quantities of land to certain members of the tribe, among others, to Francis Besion a half section, to be selected for him by the President, after survey. Besion died in 1843. After his death a half section was surveyed and selected, and a patent was issued for the same in his name. Previous to his death Besion conveyed the land to Willism Armstrong. The plaintiffs claimed under Armstrong. This court held plaintiffs' title valid. 1 Black, 355. To the same effect is the case of Doe ex. dem. Curtis and others *vs.* Wilson, 23 Howard, 457.

But, perhaps, the case the most in point, is that of the United States *vs.* Brooks and others, 10 How., 442. The facts of the case are stated fully in the opinion of the court. They are substantially as follows: On the first of July, 1835, the Caddo Indians made a treaty with the United States, a supplemental article of which reserved to Francis Grappe and his three sons, a league of land each on Rush Island. This treaty was ratified in January, 1836. The Grappes sold and conveyed to Brooks, and he conveyed a part of the land to his co-defendants. The opinion of the court shows that "on the 22d of May, 1838, a committee of the Senate reported that Rush Island never belonged to the Caddo Indians, and recommended a confirmation of the titles of certain settlers who were living on it anterior to the treaty between the United States and Caddoes.

"In 1840, memorials were again presented to Congress by these last mentioned settlers, and much testimony was

taken by the authority of Mr. Bell, chairman of the committee, to whom the memorials were referred.

"In April, 1842, a committee of the House of Representatives reported in favor of confirming the title of these settlers; and on the 6th of July, 1842, *an act of Congress was passed confirming them.*"

On the 30th of August, 1842, a joint resolution was passed by both Houses of Congress, directing the proper District Attorney of the United States to institute such legal proceedings as might be necessary to vindicate the right of the United States to Rush Island.

Suit was accordingly instituted by the United States against Brooks and others, setting up title to the island in the United States, and avering the possession of defendants to be illegal.

Brooks answered, setting up the treaty, its ratification and proclamation, and alleged that the heirs of Grappe acquired a perfect title under the reservations which he had since purchased. The other defendants answered, avering that they were *bona fide* purchasers,

From this statement, it will be seen that two distinct questions were involved in the suit.

1. Did the treaty vest the title to the lands in controversy in the Grappes and their grantees?

2. Did the subsequent act of Congress, granting the same lands to the actual settlers, divest the Grappes of their title under the treaty?

This court resolved both of these questions in favor of the Grappes and their grantees. The court in pronouncing its opinion, says: "We think that the treaty gave to the Grappes a fee simple title to all the rights which the Caddos had in those lands as fully as a patent from government could make one. The reservation to the Grappes, their heirs and assigns forever, creates as absolute a fee as any subsequent act upon the part of the United States

could make. Nothing further was contemplated by the treaty to perfect the title.

"Brooks being the alienee of the Grappes for the entire reservation, he may hold it against any claim of the United States, as his alienees would have done."

It would seem difficult to employ language more emphatic. The court declare that the title under the treaty is not only good against the Indians, but it is also good against any claims of the United States; and the treaty itself creates as absolute a fee as any subsequent act of the United States could make; that is, the treaty title was as good as any title an act of Congress, or an act of any or all the departments of our government could make. In other words, if the United States can make a valid title at all to lands occupied by the Indians, or claimed by them, then a treaty with the Indians can make a valid title to the same lands. Judgment was rendered accordingly against the United States, and in favor of Brooks and his co-defendants.

As in this case, Congress had attempted to defeat the treaty title by granting the lands sued for to the settlers, and the decision of the court was in favor of the treaty title, it follows that the court not merely decided that an Indian treaty could convey lands claimed by the United States, but it also decided that Congress could not divest a citizen of a title thus acquired. The want of constitutional power in Congress to settle or interfere with rights under treaties, except in cases purely political, was again asserted by this court in 6 Wallace, 89.

The doctrine of this court, with reference to the validity of land titles under Indian treaties, has been followed by all the State courts, and by none more closely than by the supreme court of Kansas. In a recent case that court said: "It may seem to border very closely upon the ludicrous, if not upon the ridiculous, to see the government of

the United States gravely treating with a few half-naked, half-starved savages, as though these savages were a great nation, and then have it claimed that the treaty thus made is a part of the supreme law of the land, paramount to any act of Congress, and to any constitution or law of any other States, and yet no one at this day will question the power of the government or validity of the treaty.

"But a grave question arises, where it is claimed that the President and Senate of the United States, without the consent of the House of Representatives, may dispose of the entire public domain of the nation held or occupied by Indian tribes, giving said public domain to a few railroad companies, and yet we do not consider that we are at liberty at the present day to question even that power.

"We are aware that some of the ablest and most eminent lawyers and statesmen of the nation still contend, that under the Federal Constitution the President and Senate do not possess any such powers. But from the fact that such power has been assumed on the one side for many years, and from the fact that such power has been acquiesced in on the other side for the same length of time, and from the fact that vast pecuniary rights have accrued under the belief that such power exists, which must necessarily be disturbed and divested if a different doctrine should now be held, and from the fact that even our own courts have recognized such power to exist, (Jenness *vs.* Spyback, 1 Kansas, 394; Walker *vs.* Armstrong, 2 Kansas, 198, 224,) we do not feel that we are at liberty to consider the question as still an open one. If the vast pecuniary rights that have accrued under the exercise of such a power are to be shaken or disturbed, we will not be the court to do it." Parker *vs.* Winsor, 5 Kansas, 367, 368.

But the title of defendant does not depend on treaties alone for its support. The treaties under which he claims,

and which are referred to in complainant's petition, have been sanctioned by subsequent acts of Congress. The treaty of 1835 with the Cherokee Indians was sanctioned, as has already been shown, by act of Congress, entitled "An act making further appropriations for carrying into effect certain Indian treaties," approved July 2, 1836, and by various other acts. Congress has also recognized the treaty of 1866 with the Cherokees, by the Indian appropriation act of 1866, and by subsequent statutes, as heretofore explained.

Congress has recognized the validity of the treaty of 1868, under which defendant claims so far as the sale of the neutral lands is concerned; the very sale and the very title involved in this controversy.

The fourth section of the Indian appropriation law of 1868, although already given, is again quoted in these wordes:

"SEC. 4. And be it further enacted, that the sum of ten thousand three hundred and fifty-six dollars, be, and the same is hereby, appropriated out of any money in the Treasury, not otherwise appropriated, to enable the Secretary of the interior to defray the expences of the Cherokee delegation to Washington, District of Columbia, during the year 1867; provided, that this sum be refunded to the Treasury of the United States, out of that portion of the proceeds of the sale of the Cherokee neutral lands, applicable to Cherokee national purposes."

When it is remembered that the act just referred to was approved July 27, 1868, and the treaty of 1868 was proclaimed June 10, 1868, the meaning of Congress is evident. The sale of the neutral lands mentioned in the law of 1868, was manifestly the sale of those lands provided for by the treaty of that year, for that was the only sale of the neutral lands authorized by law or treaty at the time the act of Congress was passed. Hence

Congress must have contemplated by the Indian appropriation law of 1868, that the neutral lands would be sold under the treaty of 1868, to Mr. Joy, as the treaty provides, and that the appropriation authorized by section four, as quoted, would be refunded to the United States out of the proceeds of such sale. This was the understanding of the Interior and Treasury Departments, and accordingly ten thousand three hundred and fifty-six dollars of the moneys paid by defendant for these lands, including the land in suit, have been paid into the Treasury of the United States, and the Government of the United States has received the benefit of this payment.

Add to this, that by the Indian apropppriation act of 1871, all treaties which had been made with Indian tribes before the passage of the act, were sanctioned and recognized as valid in these words: "Provided, that hereafter no Indian nation or tribe within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe or power, with whom the United States may contract by treaty; provided further, that nothing herein contained shall be construed to invalidate or impair the obligations of any treaty, heretofore lawfully made and ratified with any such Indian nation or tribe. Vol. 16, U. S. Stat. at Large, page 566.

Nor is this all. At the time Mr. Joy made his purchase of the Cherokee neutral lands the Indian intercourse act then in force expressly declared, that no purchase of Indian lands should be valid unless made by treaty, and the same act directed, that all monies received from the sales of said lands, should be paid into the treasury of the United States, and be appropriated in accordance with the provisions of the treaties disposing of said lands. Brightley's Digest, vol. 1, pages 433, 436, sec. 99, 112 and 113. Mr. Joy, therefore, when he purchased the lands in suit, was acting not only in conformity with the provisions of

the treaties of 1866 and 1868, but was also acting in conformity to the Indian intercourse act, which authorized citizens to purchase lands from Indians under treaties made with them, and which pledged the faith of the nation, that the proceeds of said sales should be appropriated in accordance with the terms of said treaties. The money which Mr. Joy paid for said lands has, in obedience to the Indian intercouse act, been paid into the Treasury of the United States, and invested as said act requires.

The act organizing the Territory of Kansas, usually known as the Kansas-Nebraska act, recognizes the right of the President and Senate to treat with the Indians in Kansas, for their lands, and contemplates the exercise of that right. See sec. 20 of act to organize the Territory of Kansas and Nebraska, vol. 10, U. S. Statutes at Large, pages 283 and 284.

We feel authorized, then, in saying that the title of defendant has received the sanction of the treaty-making power, of the legislative power, and of the executive department of our government. If such a title to lands claimed by the United States is not good against those claiming under the United States, we know not where such a title may be looked for.

Complainant still further objects to the title of defendant, because he says the sale to Mr. Joy of the land in suit is not such a sale as is authorized by the treaty of 1866. Whether this be so or not, is immaterial in this case. Whatever irregularities or defects there are in the contracts complained of by complainant in his petition, were cured by the subsequent treaty of 1868. The very contracts attacked by plaintiff are referred to and validated by the last-mentioned treaty, and the sale of the neutral lands, according to the terms of those contracts, is directed to be made to Mr. Joy. It is under the treaty of 1868, and not under the treaty of 1866, that Mr. Joy consummated his purchase and received his patent.

But the most extraordinary position of complainant is to be noticed. He insists that the treaties of 1866 and 1868 did not contemplate the sale in fee of the lands in suit. He contends that all that was meant by those treaties was to sell the Indian right to occupy the land, and that by the very act of sale that right would be extinguished, and hence the purchaser would acquire nothing. The only answer necessary to make to this position, is to refer to the treaties themselves. The treaty of 1866 directs the lands, not the Indian right to occupy them, to be sold. It also directs the lands occupied by settlers to be sold to the settlers at not less than one dollar and a quarter per acre, and it further authorizes the residue of said lands to be sold in a body for not less than one dollar per acre. The treaty of 1868 directs the sale of the neutral lands, with certain exceptions, to be made to Mr. Joy. The mode of sale, the price to be secured, and the terms of sale, all show that the title to be conveyed was a title in fee simple, absolute. To give to the treaties the construction contended for by complainant would not only do violence to the plain meaning of language, but it would involve the President and Senate of the United States in a deliberate and studied effort to practice a gross fraud, both on this defendant and the actual settlers who have purchased their homes under the provisions of the treaty of 1866 and 1868; for, if Mr. Joy gets no title to the lands which he bought under those treaties, neither do the actual settlers get title to the lands which they bought under the same treaties. Both he and they are alike defrauded by the government of the United States.

WILLARD P. HALL,

with whom is

B. R. CURTIS,

Attorney for Respondent.

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— Ingr. Davis —

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1871.

PETER J. HOLDEN, APPELLANT,
vs.
JAMES F. JOY.
} No. 360.—In equity.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF OF ARGUMENT FOR THE APPELLANT.

The complainant, under a law of Kansas, wherein the land lies, brought his bill in the circuit court to enjoin the defendant from prosecuting an action of ejectment for a quarter-section of land which complainant occupies and claims to hold under the pre-emption laws of the United States. The bill alleges possession by the complainant of the land, and competency on his part, under the pre-emption laws, to take the same; asserts that it is a part of the public lands of the United States; declares that they have been so since the Louisiana purchase, subject at one time, however, to a possessory right of the Cherokee tribe of Indians; alleges that the Indian title has become extinct by abandonment on the part of the Cherokees in several forms and by treaty with the United States; and asserts Joy's only title is a patent pretended to be issued under authority of the treaties of 1866 and 1868 with the Cherokees, which patent complainant alleges to be without authority of law.

Defendant demurs to the bill for want of equity, and because there is plain and adequate remedy at law, and because the facts set forth in the bill do not constitute a cause of action.

Demurrer sustained. Cause appealed to this court.

As to the first cause of demurrer, for want of equity, the civil code of Kansas provides this very proceeding in equity by a party in possession to quiet his title. (Eaton *vs.* Giles, Fifth Kansas Reports, 27.)

This suggestion also disposes of the second cause of demurrer, of complete and adequate remedy at law, as the statute gives to the tenant an election of one of two modes of trying the title to his lands.

The third ground of demurrer raises the only question in the cause, the validity of Joy's title under his patent as issued under the provisions of the treaty of 1866–'68.

Both parties claim under a common grantor, the United States, once the admitted owner of the lands in question—the complainant by virtue of the disposition of the public lands by the legislative, and the defendant through the treaty-making power.

Which shall prevail in the case at bar?

The United States made a treaty in 1828 (7 Statutes, 311) with the Western Cherokees to provide a home for themselves and their brothers who reside in the States east of the Mississippi forever, "a home that shall never, in all future time, be embarrassed by having extended around it the laws, or placed over it the jurisdiction, of a Territory or State." The United States thereupon "agreed to *possess* the Cherokees," as well east as west, "of seven million acres of land, and guarantee it to them forever." A supplemental treaty in 1833 (*ibid.*, 415) "agrees to *possess* the Cherokees and guarantee them forever of seven million acres of land."

An act of the 28th of May, 1830, authorized the President to *exchange* with the Indians, lands possessed by them on the east side of the Mississippi for United States lands west, "*Provided always*, That such lands should revert to the United States if the Indians become extinct or abandoned the same."

In 1835 (7 Stat., 478) a treaty was made with the *Eastern* Cherokees to carry out said act of Congress, whereby the Eastern Cherokees agreed with the United States that they should give to the Cherokee Nation (east and west) the possessory right of seven millions of acres of land theretofore given to the Western Cherokees; a perpetual outlet and use of land to the west as far as the sovereignty of the United States extends, and a body of eight hundred thousand acres of land to the northerly of the seven millions of acres, with a title such as is in said treaty described, in consideration of the cession of the lands held by the Cherokees east of the Mississippi, and five millions of dollars in settlement of estimated spoliations upon the Cherokees by the States and citizens of the United States.

The outlet strip of land and the eight hundred thousand acres, which are the subjects of the treaty made afterward in 1866 and 1868, contain the *locus de quo*.

What title, then, did the Cherokee Nation obtain in 1835 to the *locus?*

Article third of the same treaty recites that the lands ceded by the treaty of February 14, 1833, including the outlet, and those ceded by this treaty, shall all be included in one patent executed to the Cherokee Nation of Indians by the President of the United States, *according to the provisions of the act* of May 28, 1830.

That is to say, by the treaty of February, 1833, the United States agree to *possess* the Cherokees and guarantee to them forever seven million acres of land, and letters-patent shall be issued as soon as possible for the lands hereby guaranteed. By the law of May, 1830, it is "*Provided always*, That the lands which the President by that act is only authorized to exchange with the Indians shall revert to the United States if the Indians become extinct or abandon the same." He could not sell land without an act of Congress. (5 McLean, 344.) True, the second article of the treaty recites an agreement that the patent shall be a fee-simple, but that is controlled by the third article just quoted, and by the positive law of May 28, 1830.

The effect, then, of the whole is that the Cherokees have the same title to all the lands conveyed to them in one and the same patent, *i. e.*, a possessory right forever, unless they abandon the land or become extinct. This would give them, not a fee-simple, but an estate limited upon the happening of a subsequent event, not, as erroneously claimed in the defendant's brief, as it seems to us, an estate upon the condition subsequent requiring an entry or other proceeding to forfeit it, as between individuals under a condition created by deed.

But this estate is still further limited The act of June 30, 1834, (4 Statute, 730,) in operation when this treaty was made, section 12, provides that "no purchase, grant, lease, or other conveyance of land from any Indian nation or tribe shall be of any validity in law or equity unless the same be made by treaty or convention entered into pursuant to the Constitution."

Here, then, is another limitation upon this "fee-simple," impossibility of alienation, in part or in whole, by lease or deed, for years or in perpetuity, to any person or State whatsoever, or to the grantor even, except by treaty or convention, made in a prescribed form. How can the position of the defendant be maintained for a moment that these lands were sold to the Cherokees by treaty in fee-simple, as is claimed on the 24th page of his brief?

Upon the whole, is not this the legal *status* of the title to these lands:

The ownership in the United States; a perpetual usufruct personal interest in the members of the Cherokee tribe in common, terminable only by abandonment or extinction of the tribe; capable of being held in severalty, and relinquished to the United States only by convention? Is not this definition consistent with and sustained by the action of both the legislative and judicial departments of the Government?

In all legislation these titles are denominated "Indian titles," capable of extinguishment, not titles in fee. Since 1830 the laws of the United States have all looked toward their ultimate extinguishment. How can a title in fee be extinguished by abandonment or extinction of the proprietor? The courts, whenever Indian titles have come before them, have always treated them as possessory titles in the tribe, portions of which, when reserved by treaty duly authorized, to the individual, and a patent agreed to be issued therefor, assignable by deed. (Doe, dem., *vs.* Wilson, 23 Howard, 457; Wilson *vs.* Wall., 6 Wallace, 83.) This state of title to the *locus* continued in the Cherokee Nation until 1861, when they conveyed their lands by treaty to the confederate government during the rebellion.

In point of fact, they had long since abandoned those lands They were of no use to them; they had long before ceased to be hunting-grounds, and, not being held in severalty, they were not capable of being tilled to any effect. They had, in fact, become what their name indicates, "neutral lands," a dividing strip of land between civilization and semi-barbarism; civilization being in a large measure restrained from occupation by law until the abandonment was complete, and the Indians abandoning them because they were useless.

The fact of the abandonment is put in issue by the allegations of the bill, (record, pages 2 and 3,) by the averment that the Indians had abandoned their occupation of these lands and ceded them to the Confederate States of America, and received payment in part therefor in 1861, and at the time, and long before the tenant took possession, the tribe of Cherokee Indians did not live, and have not since lived, in the State of Kansas; that no individual of said tribe lived on or near said lands; and that he had taken possession of the same and occupied ever since without any objection on the part of any individual Cherokee Indian.

The demurrer admits this fact of abandonment thus plainly and distinctly alleged, and thereby the possessory and usufruct title of the Cherokees became extinct by its own limitations under the act of May 28, 1830, as well as by words of their patent itself. (See record, Exhibit E, page 28.) This being an estate upon limitations prescribed by law, requires no forfeiture, no entry, or other proceeding to terminate it.

The law acts *ex proprio vigore*, and upon the abandonment in fact being found, the whole title of the land comes to the United States, or, in the legislative words, the Indian title is extinguished. (3 Opinions, 230; *ibid.*, 390.)

It is hardly profitable to inquire how, if, as claimed by the defendant, the Indians had title in fee, this title should revert to the United States rather than to any other upon the extinguishment of the Indian title.

The day following the enactment authorizing the President to exchange lands with the Indians a settlement and pre-emption law was passed which did not extend the pre-emption laws to Indian lands when their title should be extinct, and such continued to be the policy of the Government, (lands which had been reserved to the Indians being expressly excepted by the pre-emption law of 1841, 5 Stat., 455,) until July 22, 1854, when it was enacted "that all the lands to which the Indian titles have been extinguished within the Territories of Kansas and Nebraska shall be subject to the operation of the act of 1841," (pre-emption laws.) This was followed, on the 2d day of June, 1862, by an act which is at once declaratory of the policy of the Government, and of the view which the legislature took of the title of the United States in Indian lands, which provides that "*all the land belonging to the United States, to which the Indian title has been, or shall be, extinguished*, shall be subject to the pre-emption act of 1841." (12 Stat., 413.)

Again, by the act of March 3, 1863, the legislature asserted control over all such lands, and its intent was to extinguish the Indian title in favor of the pre-emption of settlers, by authorizing the President to enter into negotiations, by treaty or otherwise, to remove Indians from lands of Kansas held by them "*in common*."

Under these enactments and this policy of the Government, the tenant alleges that he took possession of the *locus* on the 12th of February, 1867, under the limitations and provisions of the pre-emption act, has done all that is requisite for him to do, and occupied and still occupies the land.

This is our title, averred to be undisturbed save by the action of the defendant.

JOY'S TITLE.

In 1866 a treaty, of many sections, was made between the Cherokee Indians and the United States, in which, among other things, the contracting parties agree as follows: "That the Cherokee Nation hereby cedes, *in trust*, to the United States, the tract of land in the State of Kansas which was sold to the Cherokees by the United States under the provisions of the second article of the treaty of 1835, and also that strip of land ceded to the nation by the fourth article of said treaty, which is included in the State of Kansas." The treaty then provides for the survey and appraisement by representatives of the Cherokees and of the United States, with power to appoint an umpire, with a limitation that the amount shall not be less than $1 25 per acre; that the whole shall then be sold at public auction to the highest bidder, after due advertisement, for cash, in parcels of 160 acres, at not less than their appraised value; with provisions that the improved lands may be bought at the minimum price in the minimum quantity, which will include the improvements, not to exceed 160 acres; provided that nothing in this article shall prevent the Secretary of the Interior from selling the whole of said lands, with certain pre-emption exceptions, in a body, to any responsible party, for cash, for a sum not less than $1 per acre. The treaty then provides for the investment of the money.

These, then, were the trusts upon which these lands were ceded to the United States. How was that trust executed? This treaty was dated the 19th of July, and ratified and proclaimed the 11th day of August, 1866.

Without notice to any person, without appraisement, without advertisement, the Secretary of the Interior on August 30 made a contract with an incorporated company in the State of Connecticut for the sale of 800,000 acres of these lands, at the lowest possible price, $1 per acre, and within forty-eight hours vacated his office by resignation. By the opinion of the Attorney General, of the 4th of October, that agreement was declared null and void, and on the 20th of October the agent of the Connecticut Emigration Company was so notified.

How, then, stood these lands? By a treaty made with the Indians the lands had been ceded to the United States, and their title had been extinguished, whether by treaty or by abandonment. In them stood no scintilla of title. Instead thereof, they had certain agreements on the part of the United States to perform certain trusts through their officers, provided the officers had the power, or should be empowered by law so to do. Then the pre-emption laws of the United States immediately attach to these lands, as we claim, not affected at all by the treaty; but if affected at all thereby, then the right was given settlers to pre-empt them by paying to the United States the highest price bid for them, not less than $1 25 per acre; for that would be an exact fulfillment of the trust created by the treaty. It is true they were unsurveyed lands, but by the pre-emption acts which I have already cited, extending settlement to lands to which the Indian titles had been extinguished, the settlers were invited to go upon them, even if unsurveyed, by provisions which directed the method of obtaining patents of such unsurveyed lands.

At this precise stage of title the appellant in this case took possession of this land, as by the law of Congress he was assured he might do. The Indian had no longer a claim to it. The defendant had not then acquired any claim to it. The supposed title of the Connecticut Emigration Company had been declared void and their purchase null by the solemn decision of the Attorney General of the United States and by the order of the Secretary of the Interior, acting in consequence of that opinion, by direction of the President. With these guarantees of law, of executive action, and of opinion, had he not a right, at that time, to wit, on the 12th of February, 1867, to make his home there?

Here let me call attention, for it is very material, to a statement of the defendant's brief, which, from its circumstantiality, has the same tendency and effect to mislead the court as if it were calculated to deceive. It is therein stated, at page 5, that the petition alleges that on the 5th day of November, 1869, the land in suit was public land of the United States and was then settled upon by the tenant, instead of alleging the fact to be as it is stated in the record, (page 2,) that on the 12th day of February, 1867, more than a year before the defendant, Joy, claims to have had any title, the appellant entered and took possession of his land under the guarantee of the laws of the United States.

This, then, was the state of the Joy title at the time of the entry for settlement of complainant. The land had been admittedly abandoned, the Indian title had reverted to the United States. By the treaty of July 28, 1866, the land had been ceded to the United States in trust, which trust, it is true, as to the appraisement and sale to the highest bidder, had not been executed, but an attempt had been made to sell a portion of the land in one body under a proviso, which was not an

authorization, by an agreement to sell the lands, which was set aside by the highest executive officer of the Government, and not conformable even to the terms of the treaty; but whether those trusts had been executed or not, did not prevent the Indian title from having become extinguished, and the lands open to settlement.

The title thus stood until October 9, 1867, when Secretary Browning undertook to contract for the sale of a portion of the lands to the defendant Joy, by a contract which is set out on the fourteenth page of the complainant's printed argument. This attempted sale, too, was made without any advertisement or any notice to the settlers or to any party whatever. This mode of conveying this vast tract of land in one body was found not to serve the purposes of those who desired to aggregate to themselves this principality, for a nominal consideration, to the exclusion of the actual settlers, because, after the confirmation of the treaty of 1866, up to October 9, 1867, many hundred settlers, nay, thousands, had entered upon these lands, in the honest and full belief that the pre-emption laws of the United States entitled them so to enter. Something must be done to get rid of these settlers, among whom the complainant was one, and thereupon an agreement was made between Browning and Joy, that the latter should obtain an assignment of the condemned contract of Harlan to sell these lands to the Connecticut Emigration Company, which Browning himself had declared void; that Joy thereupon was to relinquish and give up the contract which Browning had executed with him, Joy; and an attempt was to be made to make a new bargain and agreement with the Indians, under the form of a treaty, which should validate and set up this contract so assigned to Joy.

Whereupon a pretended negotiation was undertaken by N. G. Taylor, a pretended commissioner on the part of the United States, and certain persons pretending to be agents of the Cherokee Nation, whose powers or authority are nowhere produced or exchanged, nor is their authority anywhere shown for their action, by which a supplemental article to the treaty of 1866 was apparently agreed upon at Washington, under date of April 27, 1868, which recites that whereas a contract was made between Harlan, on behalf of the United States, of the one part, and the American Emigrant Company, of the other part, for the sale of the so-called "Cherokee Neutral Lands," and that Orville H. Browning, Secretary of the Interior, deemed such sale illegal, and not in conformity with the treaty and amendments, and, therefore, did enter into a contract with James F. Joy for the sale of the aforesaid lands on certain terms and conditions, as therein are set forth; reciting that it is the desire of all parties in interest, (who were they?) that said American Emigrant Company shall assign their said contract and all their right, title, and claim, to said Cherokee neutral lands to said Joy; that said Joy shall assume and conform to all obligations of said company, under said contract.

It is, therefore, agreed between this handful of Indians and Taylor, that an assignment of the contract of Harlan to the Emigrant Company shall be made to Joy, and that contract is hereby, with the consent of all parties, reaffirmed and declared valid, and that the contract between Browning and Joy, of the 9th October, 1867, shall be relinquished and canceled by said Joy, and that all the contracts, and assignments, and relinquishments, shall be first entered of record; and said Joy shall execute an agreement and enter into a contract with the Secretary of the Interior, to assume and perform the obligations of said American Emigrant Company, under the first contract, as hereinafter modified, which modifications were as follows:

1. That within ten days from the ratification of this supplemental article, the sum of $75,000 shall be paid to the Secretary of the Interior, as trustee for the Cherokee Nation of Indians.

2. That the other deferred payments specified in said contract shall be paid when they respectively fall due, with interest only from the date of the ratification hereof.

3. That under the conveyance of the Cherokee neutral lands to the American Emigrant Company, as set forth in said contract, the company shall take only the residue of said lands, after securing to actual settlers the lands to which they are entitled under the provisions of the 17th article of the treaty of August 11, 1866, and amendments, and that the proceeds of said lands, so occupied at the date of said treaty by actual settlers, shall inure to the sole benefit of and be retained by the Secretary of the Interior as trustee for the said Cherokee Nation of Indians.

This pretended supplemental article of treaty was sent to the Senate, and on the 6th day of June the Senate advised and consented to a ratification of the same, and on the 10th day of June the President ratified said treaty in the following words:

"I, Andrew Johnson, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the sixth of June, one thousand eight hundred and sixty-eight, accept, ratify, and confirm the said supplemental article of treaty aforesaid.

"In testimony whereof I have hereto signed my name, and caused the seal of the United States to be affixed. Done at the city of Washington this tenth day of June."

On the eighth day of the same June, two days before the treaty took effect, Browning and Joy entered into a contract, which will be found on the 21st page of the printed record, Exhibit D, under which said last contract, the other having been relinquished, as required by treaty patents, issued in assumed compliance therewith, thereby which Joy claims title:

Whereupon the great question is:

Are these treaty provisions, in the mode carried out, sufficient in form, in effect, and in law, to entitle Joy to maintain a writ of entry, counting on his own seizin, to oust the appellant from his possession under the pre-emption laws of the United States?

It will be observed that neither treaty pretends or claims to cede or grant any title to Joy or any other person.

By the treaty of 1866 the lands are "ceded to the United States in trust."

By the supplemental article of 1868 an agreement to sell upon credit, and title to be made in the future, only executed in the name of and signed by Harlan, is ratified, modified, and agreed to.

Therefore appellant is not called upon to discuss the question whether land of the United States can be ceded by a treaty to a private party, but whether these treaties authorize the *locus* to be patented to Joy *sub modo*, in which it is claimed to have been done. This consideration causes all the learning and argument expended in the defendant's brief to show that land of the United States may be granted by treaty so as to pass to the grantee without patent, or by a patent issued in accordance with the treaty, to be useless and wasted.

The treaty of 1866 did not authorize or direct patents to issue of the land to any party, and the treaty of 1868 only attempted to ratify a contract which promised only to issue such patents.

We impeach the force and effect of these treaties to pass title in the *locus* to the defendant in these:

First. That the broadest claim for their power makes them only cede the Indian title in these lands in trust to the United States, to be disposed of in certain ways and by certain specified officers. The Government binds itself by no provision to do, or permit to be done, anything in regard to these lands. All that the treaty provides to be done by the United States is, to invest the funds received from their sale paid into the Treasury for the benefit of the Cherokee Nation.

Second. That the treaty directs the Secretary of the Interior and the Commissioner of the General Land-Office, by their description and designation, to cause the lands to be surveyed, appraised and sold and not that the United States will cause this to be done. And we deny that it is competent by any treaty, and certainly not by such a treaty, to impose any duties or powers upon the executive officers of the United States, especially those which call for the expenditure of the money of the United States, such as surveying, appraising, and selling lands of the United States, which can only be done by appropriations from the Treasury by law.

Third. That the authorization of this treaty only extends to selling the land under appraisement and advertisement in parcels, to the highest bidder after survey, and there ends the authorization or trust as to the disposition of the lands under which they were ceded to the United States.

Fourth. The proviso, which is the only pretense of authority for selling the land in a body, contains no words of authorization, but only assuming that the United States might, by law, confer some authority on the Secretary of the Interior to sell the land in a body, stipulates that there shall be nothing in this treaty to prevent such sale. The words of the proviso being, "nothing in this article shall prevent," &c.; can this be said to be an authorization?

Fifth. In this, that neither the treaty nor the supplemental article provides for patents for land to be issued by the United States, under the laws of the United States, but only gives to the Secretary of the Interior the power to sell under such conditions as the treaty authorizes, which he may be empowered to carry out by law. The whole treaty in fact presupposes legislative action to carry it into effect.

Sixth. In this, that through the unseemly haste of the Secretary of the Interior and the Emigrant Company, whose assignee Joy is, any grant of legislative authority to carry into effect the provisions of this treaty was prevented. The treaty being ratified on the 11th of August, 1866, and the contract of sale, under which Joy claims being concluded August 30, or nineteen days afterwards, without any public or private notice whatever.

We say, therefore, that while we may admit that treaties may be made with Indian tribes by the President upon subjects within the purview of the treaty-making power, the cession of public lands of the United States within its territory is not within the competency of the treaty-making power by mere convention with Indian tribes, for the reasons supported by the authorities more at large in the argument herewith filed.

We contend that no treaty made with any power can operate *per se infra-territorially* to dispose of lands or other property of the United States. To do that is, by the Constitution, reserved to the legislative branch of the Government. That at most the treaty could only make a compact for the disposition, but that the treaty is not, in this regard, self-acting

to dispose of the title of the lands; and that disposition can only be made by law of Congress, made in furtherance of such treaty.

When the treaty-making power was granted by the Constitution to the President, to be exercised by and with the advice and consent of the Senate, it was the treaty-making power known to the law of nations; that is to say, solemn compacts or conventions (*fœdera*) between sovereign powers, to be negotiated by the agents of such sovereign, to have validity only when ratified by the sovereign.

By the Constitution no treaty with the United States could have any effect until after ratification, whatever may have been the practice among sovereigns negotiating through agents with plenary powers to give treaties effect before the ratification by the head of the government. Therefore, a treaty with the United States must take effect only from its ratification by the President, with the advice and consent of the Senate, and an exchange of ratifications with the sovereign of the other contracting power. The power to make treaties such as I have described, with these limitations, was conferred upon the President by the Constitution, and required three stages for its execution:

1st. Negotiation through ministers or commissioners;

2d. Submission to the Senate to advise and consent to its ratification; and

3d. The ratification by the President.

And treaties thus made and thus known to the law of nations were the treaties that the Constitution made to be the supreme law of the land, and of equal validity in the courts of the States to acts of Congress, and over which the judicial power of the Supreme Court was extended, and this because such treaties, so made, were, of necessity, self-operative, because operating extra-territorially upon subjects in difference between nations. Can all these conditions be predicated of treaties with the savage tribes?

Indian treaties, as they are called, are anomalies, and unknown to public law, acting solely infra-territorially. They have always been agreements made in pursuance of authorization by acts of Congress.

There is another marked difference between treaties proper and Indian treaties. The former are always written in the language of each of the contracting powers; the latter never, only in the language of one, and that the dominant power; the other contracting power having no written language of its own, and being unable to read it if it had. How can an agreement, dependent upon the honesty and fidelity of a single interpreter to express the will of two or three unbreeched savages, be said to be the supreme law of the land to a highly civilized people without exciting a smile of derision? As agreements binding those savages under certain limitations by law such treaties may be entitled to a different consideration.

The first appropriation act ever passed by Congress under the Constitution was entitled "An act providing for the expenses which may attend negotiations or treaties with the Indian tribes, and the apportionment of commissioners for managing the same," (1 Stat., 54,) and the last law about treaties with the Indian tribes was passed March 3, 1871, (16 Stat., 566,) which provides that "hereafter, no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." If Indian treaties are to be put by the courts on the same plane as foreign treaties, where is the authority or validity, under the Constitution, for either of these enactments? Congress can neither add to or diminish the treaty-making power as conferred by the Constitution on the President and Senate.

With these early and late exhibitions of the power of Congress over Indian treaties, and that, too, unquestioned, how can they be said to be the treaties known to the Constitution as the supreme law of the land? Are they other than forms of agreement?

During the whole period of eighty-two years, Indian treaties have always been authorized by a prior, or sanctioned by a subsequent, act of Congress passed to give them force and effect.* They have always been held within the grasp of the legislative power. From the first, Indian treaties have never been ratified by the nation or tribe as a whole, as all treaties known to the law of nations ever have been. They have been agreements made by an agent, and not compacts or conventions between sovereign powers. No Indian treaty made with the United States has been sent back by the United States to the nation for its ratification, because the nation had no existence. How can such anomalous, unratified agreements be held to be treaties within the provisions of the Constitution so as to operate to overrule the acts of the legislature?

This court has never held an act of Congress to have been repealed or affected by the provisions of an Indian treaty. In Wooster *vs.* Georgia, Chief Justice Marshall went only so far as to hold that the laws of the State could not override a solemn agreement made between the United States and an Indian tribe to deprive that tribe of the right guaranteed by that agreement. Could a State law do that to a simple agreement between the United States and one of its citizens?

The distinction between the operation and effect of Indian treaties and those of foreign powers stands upon reason as well as authority, and is because the Indians with whom such treaties were made were, for the most part, in subjection to, and denizens of, the territory of, and within the municipal jurisdiction of, the country which chose, for certain purposes, to contract with them as independent nations, but only in so far as was convenient for the nation so to do. Indeed, during the whole time that the Government was making treaties with these tribes it was *pari passu* settling by legislative enactments the condition and rights of the Indians. There was no subject that we treated with them upon that we did not legislate upon. We took their homes from them by legislative power, moved them from place to place, and exercised every possible act of sovereignty in regard to them through legislation in time of peace.

We deduce, then, from these considerations the propositions—

1st. That an Indian treaty is an agreement only, having neither the force nor effect of a law.

2d. That an Indian treaty, always operating infra-territorially, can affect no private right of the citizen, unless made operative, or sanctioned by an act of Congress.

3d. That an Indian treaty cannot confer any power or authority, or exercise any control, or validate any act of an officer of the United States as such, and that, therefore, while an Indian treaty may, under our laws and practice, cede the possessory right of the tribe to lands to the United States *only*, (*Doe ex Dem. Mann vs. Wilson*, 23 How., 463,) provide the manner in which the proceeds thereof may be invested, provide for the internal arrangements and economy of the tribe, yet it cannot interfere with, prescribe, add to, or take from any of the duties or powers of an executive officer of the United States.

If we are right in these propositions, it follows clearly that the treaties

* 1 Benton's Abridgment, p. 671.

of 1866 and 1868, without a law of Congress to give their provisions force and effect, confer no power upon the Secretary of the Interior to sell lands ceded to the United States, or to pass the title, and, *a fortiori*, to give a patent of the United States of such lands to the purchaser, a mode of conveyance provided by act of Congress alone, and to be executed according to the provisions of law only.

These considerations are still further strengthened when it is proposed by such treaties and the action of an executive officer under them, to dispose of the public lands of the United States, and direct their titles in contravention of the pre-emption laws of the United States as settled through a series of acts of Congress, thus reversing the settled policy of the Government in regard to its public lands by conveying into one hand hundreds of thousands of acres, which, during its whole life, had been the settled policy of the Government, to dispose of in small tracts to actual settlers only.

Again, we say that the courts of the United States cannot and will not act upon the treaty as a law conferring private rights upon individuals within the territory of the United States; that the courts have always held that where treaties professed to meddle with the rights of persons infraterritorially, they operated, not as laws, but only as agreements that laws should be passed under them to effect their objects; that such treaties addressed themselves to the consideration of the political and legislative departments, and not to the judiciary. (Taylor *vs.* Martin, 2 Curtis, Circuit Reports, 454; Turner *vs.* Baptist Missionary Union, 5 McLean, 344. Cited in complainant's argument, pp. 19 and 20.)

For still stronger reason will the courts not construe agreements with Indian tribes to do what a treaty with a foreign nation could not do; or give it any other effect than that which attaches to all agreements with the Government, with whomsoever made or however to be caried out; *i. e.*, a moral obligation upon the legislative department of the Government to pass laws to put it in execution.

All the cases cited in the defendant's brief, True *vs.* Burcham, 6 Black, 355; Doe *vs.* Wilson, 23 Howard, 457; United States *vs.* Brooks, 10 Howard, 442; Wall *vs.* Wilson, 6 Wallace, 89, are cases of reservation to individuals of parcels out of the common lands to which the tribe had title, and where the United States agreed, in a treaty itself, that patents should be issued to the reservee or his assigns.

In no case has the court dealt with this proposition at bar, which is an attempt to cede to a private individual, directly or indirectly, without sanction of the law-making power, a portion of the lands of the United States by Indian treaty. Giving all the force and effect to the treaties of 1866 and 1868, that can be given to them, we insist that the farthest they can go is to confer an inchoate and possibly an equitable right to whoever might buy the lands, a patent to be issued under a law of Congress, made to carry into legal title such equitable right. But such titles would by no means support an action of ejectment against a tenant in possession.

Thus far we have dealt with the effect of the treaties as if everything had been correctly, rightfully, legally, and formally done under them, and their full force and effect had been carried out in compliance with the terms. But we now come to impeach the title of Joy, admitting

the full force and effect that may be claimed for the treaties, for other causes.

The case stands on demurrer to the bill and exhibits. It must be assumed, therefore, that the bill and exhibits show all the muniments and assurances of title that the defendant can make; that upon the title shown by the bill, and exhibits, and case, Mr. Joy must make good his claim to the land, and to maintain his action of ejectment therefor, for we have a right to defend our possession upon the weakness of the defendant's title if we may not repose on the strength of our own.

If the proviso of the seventeenth article of the treaty of 1866, "That nothing in this article shall prevent the Secretary of the Interior from selling," &c., be held to be a sufficient authorization to the Secretary of the Interior so to do, then he is empowered to sell the whole lands of the Cherokees in Kansas, less those pre-empted, in one body for cash, to a responsible party, at not less than one dollar per acre. This power, of course, must be strictly executed. The Secretary, then, must sell the whole lands. The treaty originally provided for the neutral lands only, but it was amended in the Senate "to the Cherokee lands," so as to embrace all in the State of Kansas. This was done for obvious reasons. So that the whole lands were to be sold. He must sell them for cash only.

The agreement of Harlan, (Exhibit C, Pr. Record, page 18,) under which Joy claims by assignment, does not purport to sell the whole lands. It does not sell them for cash, but they are sold upon long credit at a low rate of interest for the deferred payments.

We say he did not sell the whole lands. By the seventeenth article of the treaty, all land in the State of Kansas was ceded, to wit, the "Neutral Lands," and what was well known to the contracting parties as a strip belonging within the State of Kansas to the Cherokee Nation, running through nearly the whole length of the State, for it was one purpose of the treaty on the part of the United States to remove the Cherokee titles from all the lands in the State of Kansas. They were, by the treaty, all to be sold either by appraisement and survey or in a body. There is no provision that a part might be sold in one way and a part the other; and yet, under the contract, the piece of land known as the "Cherokee strip," which is two and a half miles wide, and running nearly the whole length of the State of Kansas, still remains unsold, so far as appears by this record, and such is the fact; so in this important particular the power of sale, under the proviso, was not carried out by the contract of Harlan; nor is this defect cured by the supplemental treaty, which modifies the Harlan contract in certain particulars only, and not in this, although it ratifies the Harlan contract, as assigned, yet it does not abrogate the former treaty to which it is supplemental or provide for the unsold strip.

It is clear that the power under the treaty to sell for cash only was not carried out, and for either of these reasons the sale is void; certainly so, if not for the effect of the supplemental article; and that agreement of sale by Harlan is not in execution of the treaty, in this, that it purports to be a sale of land by James Harlan of lands which are owned by the United States, and not a sale by the United States. The words are, "I, James Harlan, hereby agree to sell and do sell," not "the United States hereby agrees to sell and does sell." Not even in the contracting clauses of agreement does it appear a sale by the United States.

But we need not argue the nullity of this agreement of Harlan. It was so decided by the Attorney General of the United States, by the

Secretary of the Interior, so acted on by Joy, so acted on by the complainant who settled upon these lands, and so remained from the 4th of October, 1866, to the 27th of April, 1868; declared to be void in the supplemental article by which it was attempted to be set up and rehabilitated.

We need not, also, deal with the agreement between Browning and Joy, of October 7, 1867, (complainant's argument, page 14,) because both by the supplemental article of the treaty and by the agreement between Joy and Browning, (Exhibit D, page 21, printed record,) this first agreement of October 9, between Joy and Harlan, was to be relinquished, and Joy was thereafter to claim only under the assignment of the contract between Harlan and the Emigrant Company, "to be filed of record in the office of the Secretary of the Interior," provided that Joy should execute to Browning an agreement or obligation to assume and execute the duties of the Emigrant Company under that with the Secretary of the Interior. Now, then, agreement of Harlan being void, unless rehabilitated by the supplemental treaty, ratified June 10, 1868, and by an agreement to be made between the Secretary of the Interior and Joy, relinquishing his former contract, and assuming the duties of the Emigrant Company under the Harlan contract, by virtue of an assignment duly made and executed, and to be filed of record in the Interior Department; therefore, unless all this is done, any patent issued to Joy is void, as not within terms of the treaty, and nothing would pass to Joy under the terms of the treaty which was not then executed. If, after the ratification of the supplemental article, no act was done under it, then nothing has passed to the defendant.

In such haste were these men to take advantage of this treaty, devised by them to swoop into their possession eight hundred thousand acres of land, worth at the day of the agreement more than six millions of dollars, and now worth, because of settlements and improvements, more than ten million dollars, and to get control of the homes of twenty-five thousand settlers, fearful lest their speculating schemes should be interfered with by some honest official to whose notice it might come, and with other reasons for haste, they executed the contract between Browning and Joy under which Joy now claims and upon which alone he can stand, *before the treaty was ratified;* so that all their actings and doings were void and of none effect.

The agreement between Joy and Browning, under which he claims, as is shown by the record, (Exhibit D, printed page 24,) was done in Washington on the 8th day of June, 1868, while the treaty was not ratified by the President of the United States until the 10th day of June, 1868—two days afterward. If this agreement was authorized by force of the treaty as a law of the land, that law was not passed, that treaty was not ratified, until two days after the act was done by Orville H. Browning and James F. Joy, and the contract made which must validate or invalidate this proceeding by which they attempted, for a nominal consideration, to acquire for themselves eight hundred thousand acres of the lands of the United States—some of the best that the sun ever shines upon—worth, at that time, millions of dollars, and covered by the homesteads of twenty-five thousand of the free citizens of the United States.

Nor can this defect of authority be cured by the suggestion that the treaty may have a retroactive effect to the day of its date.

It would seem almost that an interposition of Providence had caused this nefarious scheme, carried on under the forms of law, but really in violation of its letter and spirit, which these bad men had contrived to

rob the settlers of their homes and poor Indians of their money to fail even through the overhaste of the conspirators in their eager avarice to grasp the prize.

It is adjudged as the law of the United States, as well as of the civil law, that a treaty cannot affect any private right till after the date of its ratification. It was decided in The United States *vs.* Arredondo, (6 Peters, 784,) that it is the well-settled law in the construction of treaties that while, in some national regards, treaties may relate back to their date, yet for all adjudications upon the private rights of citizens affected by them, they can only be operative from and after the full ratification. And it was expressly decided, following this opinion, in the case of Davis *vs.* The Police Jury, (9 Howard, 294,) that any grant made by a government to a private citizen before the ratification of a treaty, and after its date, was void, and not to be recognized by the other high contracting party, and that all private rights must take date as of the date of ratification. If there were no other objections to this title than this, I respectfully but earnestly and confidently submit that it must fail. When it had its inception, all the action to sustain it was unauthorized and without warrant of law. Nor will any of the provisions of the supplemental article avail the defendant here, because giving that article the fullest effect, it makes the execution of this contract by Browning and Joy a condition-precedent to the ratification of the Harlan contract. Joy was to assume the duties and obligations imposed by that contract assigned to him by a contract with Browning, executed only by the authority of that article.

I bring another objection to a part of the contract under which Joy claims, and which must be valid in law, and which he must be entitled to read in evidence before he can sustain his suit in ejectment.

Whatever may be claimed to be the force and effect of Indian treaties, whatever may be said to be the force and effect of the supplemental article of 1868, it cannot be well claimed, I assume, that they can repeal the revenue laws of the United States.

Let those who claim by the strict letter of the law do the letter of the law. Those who seek by the strict letter of the law to oust the complainant from his homestead must show that they have obeyed the law. By the very terms of the supplemental article of the treaty, by the terms of his contract with Browning, by the effect of the contract of Harlan with the Emigrant Company, Joy cannot be heard in court except as he is the assignee by a valid assignment from the Connecticut Emigrant Company, which has been ratified and set up by the supplemental article of the Harlan contract.

The record (page 20) shows that the assignment of the 6th of June, 1868, from the Emigration Company, assigning this contract, by which lands and realty of the value of eight hundred thousand dollars at least—and that a nominal value only—is assigned and transferred to the defendant Joy, should have, under the revenue laws, some hundreds of dollars of the revenue stamps of the United States affixed thereto, and canceled by the party signing the same, instead of a five-cent revenue stamp only, uncanceled, which appears by the record, page 20. By statute of June 30, 1864, (14 Stat., pages 292 and 299,) as amended by statute of July 13, 1866, (14 Stat., 142,) such an instrument requires many dollars' worth of canceled stamps to be affixed thereto, and for want thereof such instrument or assignment is invalid, void, and can neither be recorded nor read in evidence in any court, nor can the courts of the United States give legal effect or hear in evidence this assignment, which, by the terms of the supplemental

article of the treaty, is made a condition-precedent to its operation, until it has been properly executed according to the laws of the United States. The court may feel constrained by the forms of law in a treaty made with savages to allow the complainant to be defrauded of his homestead and the homes of his children, but I submit they are under no constraint that that shall be done in fraud of the revenue of the United States.

It may be replied that these objections are technical; that Browning and Joy supposed they were carrying out the purpose under the treaty in making this contract of the 8th of June, and therefore the court should do all they may to sustain the transaction; that from the omission to affix the necessary revenue stamps so great consequences may flow that the court should be ingenious to relieve the defendant of his difficulty. To these suggestions I answer that this whole arrangement of the defendant is but taking a technical advantage of the treaty-making power to overturn the settled policy of the United States under its pre-emption laws, and thereby to acquire many million dollars' worth of the lands of the United States; and to such technical proceeding, based on forms of law, by means of which a few are to be aggrandized at the expense of and through the destruction of so many, a techical answer is sufficient. I stand, therefore, upon the law. *Ita lex scripta.* There was no power on the 8th day of June, 1868, in Browning to make the contract, under which Joy claims, known to the law or to treaty, if that is taken to be the law; for that was not then ratified. Therefore all rights claimed under an unauthorized contract must fail, and no right can be claimed under the assignment of the Harlan contract, unless it be found to have been executed under all the forms of law.

Appendix C to Brief of Appellant.

Supreme Court of the United States.

DECEMBER TERM, 1871.

PETER J. HOLDEN, Appellant,
vs.
JAMES F. JOY. } No. 360. In Equity.

In the foregoing brief it is alleged, and so the fact is, that the 17th Article of the Cherokee treaty of July 19, 1866, as originally agreed on—

"Provided that nothing in this article shall prevent the Secretary of the Interior from selling the whole of said *neutral lands*," *&c* (Brief, 11.)

But this was *amended* so as to read:

"Provided, that nothing in this article shall prevent the Secretary of the Interior from selling the *whole of said lands*, (not occupied by actual settlers at the date of the ratification of this Treaty, not exceeding 160 acres to each person *entitled to pre-emption under the pre-emption laws of the United States,*) *in a body*, to any responsible party for cash for a sum not less than one dollar per acre."

It was then claimed (Brief, 12) that the contract of sale to the American Emigrant Company was void because the Secretary did not sell *all* the Cherokee lands in Kansas "in a body," including the "neutral lands," and that part of the seven million acre tract, and possibly that part of the outlet in Kansas.

But that sale was void for *three* reasons:

1. It was a sale for payments *on time*, whereas the Treaty required a sale for cash in hand.

This was decided by Attorney General Stanberry, October 4, 1866, and Secretary Browning accordingly held the sale *void*. But it was void because;

2. If a sale was authorized it was not of the *neutral lands alone*, but of *all* the Cherokee lands in Kansas, as the amended Treaty says, "*in a body*."

The amendment was made to the Treaty expressly for this purpose. The original *proviso* to the Treaty mentioned the neutral lands only. The *proviso* as amended omitted the word "neutral," so as to embrace *all* the Cherokee lands in Kansas.

The XVII Article, describing the lands ceded and to be sold, says:

"The Cherokee nation hereby cedes in trust to the United States the tract of land *in the State of Kansas*, which was sold to the Cherokees, by the United States *under the provisions of the second article of the Treaty of* 1835, and also *that strip of land ceded to the nation by the fourth article of said Treaty*, which is included in the State of Kansas.

Now by reference to the Treaty of 1835 it will be seen the Cherokees acquired a possessory right in two tracts of land, to wit:

1. The seven million acres, and
2. The neutral lands.

Also certain rights to *use* the land west of the seven million acre tract known as "the Outlet."

The seven million acre tract is nearly all in the Indian country now south of Kansas.

The "neutral lands" are north of and nearly adjoining the northeast corner of the seven million acre tract, and immediately west of the east boundary of Kansas.

The outlet is a body of land west of the seven million acre tract and extending indefinitely west.

But the seven million acre tract is not *all* in the "Indian country," so called, south of Kansas.

The south boundary line of the State of Kansas runs east and west about *two-and-a-half miles* south of the neutral lands. Between the neutral lands and the south line of the State is the "Quapaw strip," two-and-a-half miles wide. The south line of Kansas runs two-and-a-half miles south of the north boundary of the seven million acre tract, and also of the outlet, thus leaving a strip two-and-a-half miles wide of Cherokee land in Kansas.

This is now known as the "Cherokee strip," composed of a portion of the seven million acre tract, and of a portion *possibly* of the "outlet."

The XVIIth article cedes to be sold—

"Also that strip of land ceded to the nation by the 4th article of said Treaty [of 1835] which is included in the State of Kansas."

This was probably *intended* to include that portion of the seven million acre tract, and possibly that part of the "outlet," in Kansas. But the 4th article of the Treaty of 1835 has no reference to any lands in Kansas.

This XVIIth article probably should be read as if it said "And also that strip of land ceded to the nation by the * * * said Treaty [of 1835] which is included in the State of Kansas."

The words "*fourth article of*" should be dropped out as a *false description*, upon the maxim "*falsa demonstratio non nocet cum de corpore constat.*" This is the onlp strip covered by the Treaty of 1835, to which the XVIIth article of the Treaty of 1866 can refer. If this construction be correct, then if the Treaty of 1866 could authorize any sale, it only authorized *an entire* sale "in one body of the *neutral lands*, and the *strip of two-and-a-half miles wide* off of the north side of the seven million acre tract, and possibly off of the "outlet," in Kansas. The General Land Office only includes in this *strip* that part of the seven million acre tract in Kansas which begins at the Neosho river and runs west to the 100th meridian. The Treaty must be construed to give some meaning to it, and the whole

strip is clearly within it, and there could be no sale of the neutral lands alone, or without it. But if this whole strip is not covered by *this provision* of the XVIIth article, so *much of it as is a part of the seven million acre tract* is ceded to be sold by the *first* clause of article XVII. The words are: "the land in the State of Kansas which was sold to the Cherokees by the United States, under the provisions of the second article of the Treaty of 1835." This covers all the strip except that part of it in the "outlet," and must be sold "in a body" with the neutral lands.

3. But the whole sale was void because the treaty gave no authority to sell. Its *proviso* only declarad that "nothing in this article shall *prevent* the Secretary from selling," &c.

This is not an authority to do anything. The only authority which the treaty purports to give was to sell in parcels of 160 acres.

It is not improbable when this treaty was attempting to legislate as to the lands and to interfere with the power of Congress, that this proviso was inserted as a notice to Congress that nothing in the Treaty should prohibit the Secretary from selling all the lands in case he should be authorized by Congress to do so.

If an unnecessary and incautious *proviso* of the same sort, had been inserted in an appropriation act, it would not be construed *as authority* to make sale. It could only be *declaratory* that *it* should not be construed as *prohibitory*. So here if there was or might thereafter be elsewhere a power to sell, this only was declaratory that the treaty was not designed to interfere with *such* power. In the same *proviso* there is a *recognition of the pre-emption laws as applicable to these lands.*

It saves from sale all lands

"Occupied by actual settlers at the date of the ratification of this Treaty, not exceeding 160 acres to each person *entitled to pre-emption under the pre-emption laws of the United States.*"

It is important to notice this, as it forever estops all parties

from denying that the Treaty extinction of Indian title left these lands subject to pre-emption.

It estops all parties from asserting that the Cherokees had a *fee simple* which could defeat the pre-emption laws.

And it proves that even the Treaty did not and could not attempt to sell a fee simple, for the Cherokees did not have and therefore could not by Treaty sell a fee when they had none.

This sale by Secretary Harlan to the American Emigrant Company was therefor void, and it is not material whether for one, or all, the reasons assigned.

Now at this point in the history of these transactions, on the 12th February 1867, Peter J. Holden made his settlement and acquired his rights under the pre-emption laws.

The respondents Brief (page 5,) alleges that Holdens settlement was November 5th 1869. This is a mistake.

Holdens rights were perfect then, *before* James F. Joy could acquire any right.

Joy claims his right only by virtue of the Supplemental Treaty, concluded April 27, 1868, ratification *advised* June 6, 1868, actually ratified by the President June 10, 1868 and proclaimed same day, under which on 6th June 1868, the American Emigrant Company assigned their contract to him, and which contract the Supplemental Treaty attempted to validate, and by virtue of his contract with Secretary Browning of June 8, 1868, made *before* the Supplemental Treaty was ratified and therefore void. But these could not in any event operate *retroactively* to annihilate Holdens prior vested rights.

In Frisbie *vs* Whitney, 9 Wallace, 187, it was said the Court would protect a pre-emption claim "against the claims of other persons who have not an equal or *superior* right."

Holdens right is prior in time and therefore superior in equity.

Appropriation Acts do not Ratify Treaties.

The respondent's Brief, (p. 16,) says, "This treaty has been frequently *recognized* as valid by Congress," But if Congress had, by *concurrent* resolution, expressed an opinion that this Treaty was valid, the opinion might be erroneous and would avail nothing. There is no act to *validate* or *ratify* any provision of the Treaty which purports to authorize a sale of the lands.

The provisions referred to in the brief are found in appropriation acts. They are to be construed with reference to the object of these acts. Their purpose was to pay debts, legally or morally, owing by, or to perform obligations, legally or morally resting on, the United States. Beyond this they had no purpose.

Neither the *title* or *character* of the acts indicates any purpose to *ratify* the Treaty.

An act of Congress which would ratify this Treaty or the provisions of it which purport to authorize a sale of land, must repeal *pro tanto*, the pre-emption acts as extended by the acts of July 22, 1854, (10 Stat., 310,) and June 2, 1862, (12 Stat., 413.)

It would be a marvellous construction indeed to hold that the *appropriations* referred to had broken up the land policy of Congress, and repealed laws on that subject. It would be a repeal by implication—not favored in law—and a repeal by implication which would find no parallel. It would be alike new to legal jurisprudence and surprising to Congress.

Such a construction would convert an appropriation act into a trap to catch unwary legislators. The *consequences* of such a construction of multitudinous appropriation acts cannot be foreseen.

There is nothing in the provisions cited which require any such construction.

If Congress had designed to *ratify* a sale, the statute would

have used apt words for that purpose. It would have said, "and the provisions of said Treaty are hereby ratified," or as in the numerous acts passed to execute Treaties, provision would have been expressly made to execute it or to authorize patents, if Congress had designed to ratify or execute it In view of the many acts passed to execute other Treaties the *omission* to pass any act for this Treaty is significant.

The act of July 28, 1866, (14 stat., 326,) cited in respondent's brief, (p. 16,) appropriates $10,000 to pay expenses of Cherokee Delegates to Washington to negotiate Treaties to be refunded to the Treasury from the proceeds of the sale of the neutral lands. This was *before* the Treaty was finally ratified or proclaimed. The Treaty and Senate proceedings were secret until proclaimed. *Congress knew nothing of its provisions* and could not intend to ratify it. Suppose the Treaty had not been finally ratified, would this appropriation have given it the force of law? Most certainly not. It was very proper to pay the expenses of Delegates, and to provide for refunding to the Treasury from the sale of the lands. But this, it is to be presumed, contemplated a sale either in accordance with the existing pre-emption laws or laws to be passed. It could not then be known that the Treaty ever would be agreed on; and the sale to Joy is not in pursuance of the Treaty *then being made*. He claims, under the Supplemental Treaty and contracts.

The appropriation act of July 27, 1868, (15 Stat., 223,) cited in respondant's Brief, (p. 20,) appropriates $10,356 to pay expenses of Cherokee Delegation in 1867, to be refunded to the Treasury out of that portion of the proceeds of the sale of the Cherokee neutral lands applicable to Cherokee National purposes.

The Treaty was valid so far as it extinguished the Indian title. But if it had even been in all respects *void*, Congress might well pay expenses of Delegates.

And as to refunding from the sales of land, Congress

knew the lands must be sold either under existing laws or others to be passed, and it may well be supposed that the fund in contemplation was designed to come from *such* sales.

The Treaty expressly provided for sales of land—

"Occupied by actual settlers at the date of the ratification, * entitled to pre-emption under the pre-emption laws of the United States."

From these a fund was to and did arise in a *constitiutional way* applicable to Cherokee National purposes, or which Congress might feel called on in good faith to so appropriate.

The Osage Treaty of September 29, 1865, (14 Stat., 687,) required the Osage *ceded* land to be sold. Appropriations were made to pay expenses under the Treaty, to be reimbursed to the Treasury. But Congress provided for a sale of the lands by Joint Resolution of April 10, 1869, regardless of the Treaty. The Act of July 15, 1870, also provides for the sale of lands regardless of article XVI of the Treaty.—See 14 Stat., 251-381-504. 15 Stat., 118. 16 Stat., 39.

But in addition to this it is impossible that the House of Representatives on the 27th of July, 1868, the date of the appropriation act, could have agreed to *ratify* the sale attempted to be made by the Cherokee Treaty. The votes and proceedings relative to *these lands*, and other similarly situated in June and July, 1868, conclusively negatives any such idea, the House having, by six solemn votes denied the power to thus sell land by Indian Treaty. (See proceedings in the preceding Brief, p. 96 to 99.)

And besides it is not reasonable to suppose Congress intended to give effect to unconstitutional provisions of a Treaty.

The appropriation left the Treaty as it found it—left it to the fate which awaits it in the courts.

If the appropriation act contemplated a refunding to the Treasury from the Treaty sales, and none could be by the

Treaty constitutionally made, then there could be no refunding by *that process*. If the act had looked to an unratified Treaty for the same purpose as in case of the Treaty of July, 1866, and no final ratification could be had, the hope would be disappointed. The unratified Treaty would not be made effectual for any such purpose. An act which relies on unconstitutional means or sources must equally be doomed to disappointment.

And this is a sufficient answer to the all clauses cited from appropriation acts in respondent's Brief.

The defendant's Brief cite but a single case which had not been before referred to in the Brief of the appellant, that of Crews *vs.* Burcham, 1 Black, 352. That case does not sustain any Treaty powers to sell lands.

It was a controversy as to land where both parties claimed under *a common source of title*, and no question was made as its validity. The Treaty in that case was not made in opposition to a statute as was the Cherokee Treaty. It was in fact *authorized* by the act of May 28, 1830. And see 9 Stat., 213–572–586.—1 Lester Land Laws, 133. Brief *ante* 59–114.

WM. LAWRENCE,
Of Counsel.

April 15, 1872.

CORRECTIONS IN BRIEF.

Brief, page 24.—On page 24 is an extract from the contract of sale from Secretary Browning to Joy, which contract was cancelled by the Supplemental Treaty. Joy claims, by virtue of his agreement, June 8, 1866, with Secretary Browning [Record p. 24.] and as assignee of the contract of Secretary Harlan with the American Emigrant Company, found on page 19 of the printed Record in this case. By that contract

"The United States agree * to convey the same [lands] by patent to said company or it assignees."

And by the contract of June 8, 1868, Secretary Browning agreed that

"The United Utates shall and will, * cause patents of said lands to be executed and delivered to the said James F. Joy or his assignees."

The legal question on this is the same as that which would arise on the clause quoted from the cancelled contract if it had remained in force.

Brief page 132.—Line 3 from top *add*: See pages. 8–78—79.

SUPREME COURT, U. S.

PETER J. HOLDEN, APPELLANT, *vs.* JAMES F. JOY.

MR. B. R. CURTIS:

May it please your Honors, — I propose to state, as succinctly and clearly as I can, the legislative history of this title. When I shall have done so, the Court will be able to perceive what field for argument, if any, there is. Without a clear and consecutive view of the legislative history of the title, it is impossible for the Court to know whether any point which may be started, is a merely moot point, or one which has application to the case.

The origin of this title was the treaty of 1835, between the United States and the Cherokee nation of Indians.

It is known to the Court, as matter of history, that for some years prior to 1835, a much troubled state of affairs had existed between the Cherokee nation of Indians and the State of Georgia, within the limits of which State the lands of that nation lay. Those troubles appeared in various forms in this Court; in the cases of the Cherokee nation *vs.* The State of Georgia, and in the cases of Butler and Worcester *vs.* The State of Georgia.

It was considered important by the then President of the United States, that these troubles, and all sources of them, should be put an end to by a purchase from the Cherokee nation of all their lands lying east of the Mississippi River; and it appears from the recitals contained in this treaty of 1835, that on a proposition to that effect being made to the Cherokee nation, a qualified assent was given to it, accompanied with the condition that the Senate of the United States should take upon itself the office of arbitrator, and fix the sum which the United States should pay therefor; that the Senate did take upon itself this office, and named the sum of $5,000,000, as the proper sum to be paid; and

it is one principal object of this treaty to make a cession to the United States, by way of sale, for the sum of $5,000,000, of all the lands of the Cherokee nation, east of the Mississippi river.

The treaty had, however, another object. This branch of the nation which entered into this treaty had in view to join the other branch of the nation which had already been settled on lands set apart for that purpose by the United States west of the river. But it was apprehended, as the treaty shows, that the lands theretofore set apart for the use of the Cherokee nation west of the river might not be sufficient in quantity after the entire nation, consisting of the two bands should have been joined in that country; and accordingly, there will be found on the 480 page of the 7 Sts. at large, this recital and grant.

"Whereas, it is apprehended by the Cherokees that in the above session" (which is one which had already been stipulated for west of the river, with the bands that had previously gone there), "whereas, it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation, on their removal west of the Mississippi river, the United States *in consideration of the sum of* $500,000 *therefor, hereby covenant and agree to convey to the said Indians, and their descendants by patent in fee simple, the following additional tract of land,*" 800,000 acres, since known as the Cherokee neutral lands. The Cherokee neutral lands then were acquired by that nation by purchase for the sum of $500,000 in fee simple.

It was suggested yesterday, in argument, that this treaty was negotiated by force of an act of Congress, passed in 1830, by which the President of the United States was authorized to lay off districts west of the Mississippi river, outside the limits of any State or any organized territory, and prepare them for the reception of such Indians as might elect to emigrate thither from the east of the Mississippi river; and the President was also authorized to exchange such districts for lands lying east of the river, and belonging to Indians who thus elected to emigrate.

But it will be apparent, certainly on a little reflection, that this treaty was not negotiated by force of that law. This is not a treaty to lay off a district west of the Mississippi, and exchange it for a district or lands east of the Mississippi. It is a treaty to purchase the lands of the Cherokees for the sum of $5,000,000, and a further agreement to sell

the neutral lands to the Cherokees, 800,000 acres, for the consideration of $500,000 to be paid therefor.

Neither of those objects was within the act of 1830, or authorized thereby. It was a treaty made under the treaty-making power, by the President and senate, and by and under that power alone. Certainly it was in accordance with the policy of Congress, but it was not made by virtue of this act of Congress.

Now, it is true of this treaty, as of all others, not of Indian treaties alone, but of all treaties, that when they contain stipulations to pay money out of the treasury of the United States, it is in accordance with the usages of this government, that the interposition of Congress is necessary in order to appropriate the money. And for this reason, not because it was an Indian treaty, not because it was not negotiated by force of the constitutional power to make treaties, but because it called for appropriation of money from the treasury, that the interposition of Congress was necessary. And Congress did interpose.

It will be found by reference to the act of July 2, 1836 (5 Stat. 73), what Congress enacted in reference to this treaty, and the Court will see that it is a plain ratification, so far as Congress could ratify a treaty, of both these articles to which I have referred, namely: the article by which the lands were *bought* for $5,000,000, and the article by which the neutral lands were *sold* for $500,000. This is the language of the act: —

"For amount stipulated to be paid for the lands ceded in the first article of the treaty with the Cherokees, of the 29th of December, 1835, *deducting* THE COST *of the land to be provided for them west of the Mississippi under the second article of said treaty*, $4,500,000."

There, both the articles are designated by Congress, and one is treated as a purchase for $5,000,000, and the other as a sale for $500,000.

It was said yesterday, in argument, that there was not a purchase by this Indian nation, because they paid no money. They had no occasion to pay any money; they bought the land of their debtor, and they extinguished so much of the debt as the price of the land amounted to; and that was a completed transaction of purchase and sale as much as if they had received the whole $5,000,000, and afterwards paid over $500,000 of it. So Congress viewed it, for they spoke of the deduction of the cost of the land provided for them by the second article of the

treaty, which are these neutral lands, as so much deducted for that cost from the sum which would otherwise have been due and payable.

This, then, was a transaction of the most solemn kind, concluded between the United States and the Cherokee nation of Indians; first, by the treaty making power, and afterwards, with the concurrence of Congress, providing the necessary means by which this nation of Indians became owners in fee simple of this land for a valuable and adequate consideration. So the title stood down to the time when the treaty of 1866 was made.

I shall have occasion to comment upon certain facts connected with this treaty hereafter; but I am here stating the legislative history of this title.

I now ask your Honors to consider how far, and with what effect, Congress has interposed in reference to this treaty of 1866, and the supplemental article of 1868, by which this title was acquired.

The 29th article of the treaty reads as follows: —

"The sum of $10,000, or so much thereof as may be necessary to pay the expenses of the delegates and representatives of the Cherokees invited by the government to visit Washington for the purpose of making this treaty, shall be paid by the United States on the ratification of this treaty."

Although moneys would ultimately come from the sales of the lands provided for by the treaty, yet, in the first instance, inasmuch as this money was to be paid on the ratification of the treaty, it was necessary that Congress should interpose and make provision for its payment, and accordingly, your Honors will find that, by an act passed on the 29th of July, 1866, and found in the 14th statutes, page 326, this provision was made: —

"To enable the Secretary of the Interior to pay the reasonable costs and expenses actually paid, or incurred by the delegates of the Southern Cherokees in coming to and going from Washington, and during their stay in and about the negotiation pending the confirmation of treaties with the Indian tribes, a sum not exceeding $10,000." But that is not all.

"*Provided*, That said sum shall be refunded to the treasury *from the proceeds of the sales of the Cherokee neutral lands in Kansas.*"

Congress, at the same time that they made this appropriation, by way of advance, to pay the expenses of negotiating this treaty say, that

is to be reimbursed out of the proceeds of the sales of the neutral lands. What neutral lands? Only these. What sales? Why, those provided for in the treaty.

Further than this, may it please your Honors, there is in the treaty, article 12, section 1, which requires attention.

"After the ratification of this treaty, and as soon as may be deemed practicable by the Secretary of the Interior, and prior to the first session of said Council, a census or enumeration of each tribe, lawfully resident in said territory, shall be taken under the direction of the Commissioner of Indian Affairs, who, for that purpose, is hereby authorized to designate and appoint competent persons whose compensation shall be fixed by the Secretary of the Interior, and paid by the United States."

Now, in the 14th statutes, p. 499, is found this provision: —

"For this amount, or so much thereof as may be necessary to enable the Secretary of the Interior to cause a census of each tribe to be taken under the provisions of the 12th article of the treaty of July 19, 1866, — $2,500."

In the same treaty, in articles 28 and 30, are these provisions: —

"The United States hereby agree to pay for provisions and clothing, furnished the army,"— under an unpronounceable Indian name — "in the winter of 1861–62, not to exceed the sum of $10,000 on the account to be ascertained and settled by the Secretary of the Interior."

Article 30 reads: —

"The United States agree to pay to the proper claimants, all losses of property by missionaries, or missionary societies, resulting from their being ordered or driven from the country by United States' agents, and from their property being taken and occupied or destroyed by United States troops, not exceeding in the aggregate $20,000, to be ascertained by the Secretary of the Interior."

On the same page, in connection with what I first read, in the act of Congress, follows an appropriation or appropriations for provisions and clothing furnished the army under this Chief in the winter of 1861–2, *per 28th article of the treaty of July* 19, 1866, $10,000.

"For paying of losses of property by missionaries or missionary societies, etc., *treaty July 19th*, 1866; *30th article* $20,000."

Thus far, we go under the original treaty; but it was found by the Secretary of the Interior, after the contract made by Mr. Harlan had

been by him disallowed, and he had refused to act under it, that the original treaty had not made, as was thought, the most expedient provisions, those which would produce the most money for the Indians on the sale of these lands; and, therefore, it became necessary to summon the Indian Commissioners a second time to Washington in order to negotiate this supplemental article.

Now, if the Court will refer to the 15th statutes, page 223, they will see what notice Congress took of that. "That the sum of $10,356 be, and the same is, hereby appropriated out of the money in the Treasury not otherwise appropriated to enable the Secretary of the Interior to defray the expense of the Cherokee delegation to Washington, D. C., during the year 1867." The other treaty you will remember bore date on the 19th day of July, 1866. The provision which I have previously read for the payment of the expenses of the commissioners applied to expenses accruing in the negotiation of that treaty; but the commissioners had again been summoned to negotiate the supplemental article; they had come here some time in the year 1867, having concluded their labors in April, 1868, and this provision is made to pay their expenses.

Thus far, we see in the first place, the negotiation of the original treaty; the recognition of that fact by Congress, in making an appropriation for the expenses, and in making these other appropriations under the treaty, specifying the articles to carry out what was promised in the treaty by those articles. We find also that in doing this, Congress has expressly provided, that although these moneys are to be thus advanced out of the Treasury, they are to be reimbursed from the sales of neutral lands. This last act, to which I wish to refer, is dated the 27th of July, 1868, and it contains the proviso, "That said sum be refunded to the Treasury of the United States *out of that portion of the proceeds of the sale of the Cherokee neutral lands in Kansas, applicable to Cherokee national purposes.*"

The additional article of the treaty was concluded on the 27th of April, 1868. It was proclaimed the 10th of June, 1868. So that, on the 27th of July, 1868, when Congress made this provision for deducting the amount of that appropriation out of the proceeds of the sales of the Cherokee neutral lands, it could refer to nothing except this very sale to Mr. Joy, which is now under consideration; because, that supplemental article had a provison that a contract should be

made by Mr. Joy to perform all that the land company had agreed to perform, with some modifications, and that the lands *should be patented to him* under that contract, as fast as they should be paid for.

I proceed now, having stated the legislative history of this title, to the pretensions which are set up here on the part of the counsel of the appellant. They may be be stated, in the first place, to be: that, in February, 1867, — the date when the record shows the appellant entered upon *this land, — this was public land of the United States, subject to preemption.* That is what they undertake to maintain; if they can maintain that, they can succeed. If they cannot maintain that, they must fail. And the inquiry is, whether they can?

In the first place, the learned counsel argues, that by an Act passed on the 22d of July, 1854, found in the 10th statutes, section 12, page 310, there is a provision which he considers applicable to this case. It reads thus: —

"That all the lands to which the Indian title has been or shall be extinguished within said territories of Nebraska and Kansas, shall be subject to the operations of the preemption Act of the 4th of Sept., 1841, under the conditions, restrictions and stipulations therein mentioned."

Now, turning to the preemption Act thus referred to, found in the 5th statutes, page 455, section 10, we find "That from and after the passage of this Act, every person being the head of a family, or widow, etc., etc., having filed his declarations, who since the first day of June, 1840, has made, or shall hereafter make a settlement in person, *on the public lands to which the Indian title had been at the time of such settlement extinguished.*" There are two requirements, and manifestly both of them are essential; not merely substantial, but essential. First, that it should be public lands of the United States; and secondly, that the Indian title should be extinguished.

I find it extremely difficult to follow the course of the argument on the other side, on this subject. Most certainly, these were not public lands of the United States. The United States had sold them to the Cherokee nation of Indians for a valuable and adequate consideration years before, covenanting that they should have a good title in fee simple, and that title remained in the Indians down to the time when the treaty of 1866 was negotiated. That treaty either took effect or it did not take effect. If it did not take effect, the title remained in the Indians. If the objec-

tions which have been taken here were sufficient to show that that entire 17th article of the treaty was void, why, certainly, the learned counsel will not undertake to maintain, I suppose, that it could be both void and valid; void for one purpose, and valid for another purpose; valid to transfer the legal title to the United States, and void to declare the sole purpose of the conveyance. If void, I say the title remained in the Indians If valid, the legal title passed to the United States; *but the title of the Indians was not extinguished, within the meaning of this pre-emption act.*

If I convey land to a trustee in trust to sell it, I pass my legal title to him, but I do not *extinguish* my title. I am still the beneficial owner of that land, and I continue to be so until the trust has been executed, and the title is passed in conformity to it. And so it must be here. If they can successfully maintain that the trust which was created was an illegal trust, one which was contrary to law, and that the whole article, as they contend in some parts of their argument, was void, then the title remains to-day in the Indians, except so far as it may be understood to have been divested by the patents actually made to Mr. Joy, which would give him a right of possession, which would be good against anybody but the Indians themselves.

And here I beg leave to draw the attention of the Court to a piece of legislation which has a most important bearing on the character of this trust and its validity.

So far from its being true, may it please your Honors, that there is anything illegal in the nature of this trust or the manner in which it is declared by an Indian treaty, so long ago as the year 1837, it was so much a recognized part of the policy and practice of this government to accept cessions of Indian lands in trust by a treaty, and to sell them and hold the proceeds for the benefit of the Indians, that the subject is regulated by a general law of Congress. In the 5th statutes, page 135, will be found a law passed on the 9th of January, 1837. Section 1 reads. "That all moneys received from the sales of the lands that have been, *or may hereafter be, ceded to the United States by Indian tribes, by treaties*, providing for investment or payment to the Indians, parties thereto, of the proceeds of the lands ceded by them respectively, after deducting the expenses of survey and sale, any sum stipulated to be advanced and the expenses of fulfilling any engagements contained

therein, shall be paid into the treasury of the United States, in the same manner that moneys received from the sales of public lands are paid into the Treasury."

Here is the regulation of this general subject, recognizing the fact that such treaties had been theretofore made and were expected to be thereafter made; and pointing out that after deducting from the proceeds of sales provided and stipulated for by such treaties, the expenses, the balance was to be put into the Treasury of the United States in the same manner as the proceeds of sales of public lands. And then follows this most pregnant sentence: "That *all* sums that are or may be required to be paid, and *all* moneys that are or may be required to be invested by said treaties, *are hereby appropriated in conformity to them*, and shall be drawn from the Treasury as other public moneys are drawn therefrom under such instructions as may from time to time be given by the President."

It was so much a matter of course, that such treaties should be made, they were expected to be made so frequently, and it was considered so just and proper they should be made and their stipulations carried into effect, that here is a general sweeping appropriation covering every thing which should be stipulated by such treaties. An instance of legislation for the appropriation of moneys in advance of treaties such as I think cannot be found anywhere else in the history of this government. So that if there is a distinction to be made between treaties of this character and designed for this purpose, and other treaties, they are placed by this legislation of Congress even higher than any other class of treaties.

I find that in the brief of appellant's counsel, some reliance seemed to have been placed upon an alleged infirmity in the Indian title which, before I go further, perhaps I ought to notice.

Nothing has been said about it in the argument, so far as I have observed, but I ought to notice it, because it is made a point in the brief, and there are certain facts stated in the record, and admitted by the demurrer, which have a bearing upon it. The United States, as I have already shown, stipulated, by the treaty of 1835, to sell these lands, and make a valid title in fee simple to the Cherokee nation of Indians. Nothing was said in that article of the treaty, and certainly nothing can be implied concerning any conditions which were to be inserted in

the patent. Nevertheless, when the patent was issued, it embraced not merely the neutral lands, but other large tracts of lands, which were to be conveyed independent of these neutral lands.

They were all embraced, and it was agreed they should be, in one patent, and that patent contained two conditions which were read yesterday; that the land should revert to the United States provided the nation should become extinct, or the land should be abandoned, by the nation.

Now, if it were necessary for me to maintain, I should certainly attempt to do so, that the application of that condition to abandonment of these neutral lands was in conflict with the treaty, and therefore was void, as respected these lands; though the other of these conditions is one which silently would be engrafted on the grant independent of any express words: namely, if the nation should become extinct, the lands should revert to the United States; because I suppose it is just the same whether the Cherokee nation becomes extinct and the lands revert to the grantor — escheat would be the more proper word — or whether there is a grant to an individual and he and his heirs become extinct and the land escheats to the state.

Therefore, I should not undertake to quarrel with that condition. It was well enough to insert it, if it was thought needful to insert it. But the other condition in regard to the abandonment of the land, is one which I should submit, if it were necessary, was wholly unwarranted by the article in the treaty, which stipulated absolutely — not conditionally, but absolutely to make a title in fee simple. But this becomes of no practical importance in this case, so far as I can see, because a fee simple may be conveyed on condition as well as absolutely. It is true, that a portion of the Cherokee nation of Indians, during the late civil war, adhered to the Confederate cause. Another portion of the nation adhered to the United States. The history of the matter is given in a report by the Secretary of the Interior, which is referred to on our printed brief, and, if the Court has any curiosity to follow the details, they will be found there. They do not seem to be important in the case. It is important, however, that the Court should notice some of the legsilation which took place bearing on this subject.

The act of July 11, 1862 (12 sts., 528) authorizes the President of the United States, in case he should find any Indian tribe in hostility to the

United States, and should think fit to do so, to issue his proclamation and declare all treaties with that tribe terminated. That is the substance of the legislation.

Now, the President never issued any proclamation in regard to the treaties in force with the Cherokees. On the contrary, in the year 1866, as the Court has seen, immediately after the war, this treaty of 1866 was made with the Cherokee nation. The preamble and first article of the treaty are as follows: "Whereas, existing treaties with the United States and the Cherokee nation are deemed to be insufficient, the said contracting parties agree, as follows, to wit:—

Article first. The pretended treaty made with the so-called Confederate States by the Cherokee nation on the 7th day of October, 1861, and repudiated by the National Counsel of the Cherokee nation on the 18th day of February, 1863, is hereby declared to be void."

Then comes the second article, which is an article of amnesty for all past offences. Of course, after the negotiation and ratification of this treaty of 1866, it was too late to insist upon the prior hostility of the Cherokees in this war. And the United States never did insist upon it, or attempt to insist upon it for any purpose.

Now, if this be a condition lawfully inserted in this patent, that if the Cherokees should abandon the lands, they shall revert to the United States, it is a condition subsequent, beyond all doubt, and no one but the United States could take advantage of it. If it be a lawful condition, the United States could enter through its officers for the breach of that condition, or the United States might waive the breach, and release the condition itself. And by this treaty they have done both; because they have accepted a cession of those lands from the Cherokees in trust to sell them for the benefit of the Cherokees.

The language is: "*The Cherokee nation hereby cedes in trust to the United States the tract of land in the State of Kansas,*" etc.

After that, manifestly not the United States themselves could take advantage of a breach of this condition, or insist on its existence for any purpose; *a fortiori*, a mere stranger to the title could not do so.

I pass along, therefore, for I believe I have said all I desire to say upon this subject of the supposed infirmity of title of the Indians, and I come to a point which is greatly insisted upon by the learned counsel in

his brief and his learned argument. It is, in substance, that an Indian treaty cannot vest in an individual a valid title to Indian lands.

By Mr. Butler,—

Lands of the United States.

By Mr. Curtis,—

Lands of the United States if you please; by which I suppose, is meant the lands of which the United States had the general ultimate fee, the Indians having the right of occupancy. If that is meant, it has no application to this case, because as already submitted and shown, these were not lands of the United States. They were lands sold by the United States to the Indians for a valuable and adequate consideration, agreed to be conveyed in fee simple and actually conveyed, "To hold the same with all the rights, privileges and appurtenances thereto belonging to the said Cherokee nation forever." (Record 27, 28.) But take the proposition exactly as the learned counsel corrects me in stating it, that an Indian treaty cannot vest in an individual a valid title to Indian lands of which the United States had the ultimate fee subject to the usual Indian title of occupancy.

Why not? Why, because the constitution says that Congress shall have power to dispose of and make all needful rules and regulations concerning the territory and property of the United States. Granted. But how is Congress to dispose of the property of the United States, including the public lands? Why, Congress can only legislate. Congress can dispose by manifesting its will, and only in that way. It does not seem to have occurred to the learned counsel on the other side to look to see whether Congress *has* manifested its will in regard to the acquisition of titles to Indian lands by Indian treaties.

It is true, beyond all peradventure, that from the beginning of the second year of this government down to the year 1871, when Congress passed an act concerning Indian treaties to which I shall refer presently, the will of Congress was manifested; and it was manifested to the effect, not only that individuals could acquire titles to Indian lands by Indian treaties, but that they could be acquired by nobody in any other way.

On the 22d day of July, 1790, an act was passed which is found in the first statutes, page 138, section 4, "That no sale of lands made by any Indians, or by any nation or tribe of Indians within the United

States, shall be valid to any person or persons, or to any State, whether having a right to preemption of that land or not, *unless* the same shall be made and duly executed at some public treaty, held under the authority of the United States." This was a temporary act, which lasted for two years, and until the end of the next Congress. Now, if we follow this down, we shall find in 1793, in the same volume, page 330, section 8, an act still more explicit. I will read this section and then give your Honors references to the subsequent legislation; for this, also, was only a temporary act.

I read the section because the language is peculiar and very significant in reference to the subject we are now considering, and has always been continued in the legislation of Congress since, "That no purchase or grant of lands, or any title or claim thereto, from any Indian, or nation, or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity *unless* the same be made by a *treaty or convention entered into pursuant to the Constitution.*" There is the will of Congress; and, by a series of acts, it is its established will; one passed in 1796, found in the first statutes, page 472, another passed in 1802, found in the second statutes, page 143, another passed in June, 1834, found in 4 statutes, page 730. The last two are permanent laws concerning Indian intercourse.

It is true, then, from the earliest time in the history of this government, that Congress, using the power which it had to dispose of the public lands has manifested its will that by an Indian treaty, and that by an Indian treaty only, title to Indian land could be acquired, either by States or private individuals, and Congress has said — when so manifesting its will — it must be by a treaty such as is provided for under the Constitution, showing its construction of what an Indian treaty was. Add to this, if your Honors please, the general law which I have already referred to, regulating these trusts of cession, and sales under them, and the disposition of the money, and you have the whole subject of the acquisition of titles by individuals under Indian treaties before you so far as it depends on legislation; and in conformity with this legislation are the numerous decisions of this Court, referred to in our brief, *to the effect that titles to Indian lands may be acquired by treaty*, and although by the act of 1871, Congress undertook to, and perhaps did,

put an end to the tribal capacity of these dependent nations to negotiate further treaties, *those already negotiated are expressly saved.*

It is insisted, however, that this treaty does not contain any patent, does not provide for any patent, and does not contain any grant to Mr. Joy. Well, it is not consistent with the nature of the transaction that it should contain a patent to Mr. Joy, or should contain a grant to Mr. Joy. It contains a cession of the land to the United States and that cession is made to the United States in trust to sell; a sale had been agreed upon between Mr. Joy and the Secretary of the Interior, at the time when this supplemental article was negotiated. That sale by the Secretary of the Interior, under the trust to Mr. Joy, is described and ratified and approved of in this supplemental article. Now, to say that this supplemental article does not convey the lands to Mr. Joy, is to state what is true but entirely consistent with what the treaty provides for, namely, that the Secretary was to convey them to him, by patent, in the name of the United States, in whom the legal title had been vested by the treaty.

It is further insisted, that the validity of these proceedings cannot be maintained because the Secretary of the Interior, and the Commissioner of the Land Office, are required to do something; that the treaty is invalid because these public officers are to do something under the treaty.

Well, it would be a very strange treaty, certainly, an unusual treaty, under which some public officer was not to do something. If the President and the senate have the power to make such a treaty as this, and the stipulations in the treaty are what this Court must consider them to be, — appropriate stipulations, — then is it to avoid this treaty that the Secretary of the Interior is to perform certain acts, and the Commissioner of the Land Office certain other acts?

Your Honors have seen, if you will allow me to recur once more to it, that Congress, in 1835, legislated generally on this class of subjects, namely, cessions by Indians in trust. They speak of them as having been theretofore made; and they show the expectation that they will be thereafter made; they speak of surveys, and the expenses of the surveys, of the sales and the expenses of the sales, and provide how they shall be taken out of the proceeds. Well, if there were to be surveys and sales, and other expenses, there must be somebody to make surveys, and somebody to make the sales, and somebody to incur

the expenses, all of which is plainly contemplated, in this act of Congress, regulating these cessions in trust And why not the Secretary of the Interior? All these Indian affairs belong to his department. He is the appropriate officer to have the supervision over this subject, and see that the stipulations of this treaty are carried out fairly and effectually on behalf of the contracting parties. Why should he not be selected under the treaty making power?

The learned counsel says the treaty cannot appoint an officer. That may be true; but if the treaty finds him already appointed and charged with a class of duties, one of which, under the treaty, falls naturally and properly under his office, why, in the name of all that is practicable, should he be not charged with the duty of performing it? The Commissioner of the General Land Office was also to do something. The law of Congress foresaw that the Commissioner would be called upon to do something under treaties of this kind, and accordingly an act was passed on the 8th of April, 1864, found in the 13th statutes, 41, which requires him to have the necessary surveys made.

In the 14th statutes, 318, is another act making an appropriation for the expenses of these and other similar surveys This appropriation bill was passed on the 28th day of July, 1866. This treaty was dated in April, and was promulgated in June. It contains this provision, "for surveying Indian and other reservations under treaty stipulations at not exceeding 15 dollars per mile front boundaries, 10 dollars for townships, and 8 dollars per mile for sections; $50,000." We got the money, then, to make these surveys by the will of Congress, and in the 13 statutes, page 41, to which I have already referred, will be found a law providing that when it should become necessary to survey Indian lands, they shall be surveyed under the Commissioner of Public Lands in the same manner that public lands of the United States are surveyed, which is precisely what they stipulated for in this treaty: viz., That these surveys were to be made under the direction of the commissioner in the manner the surveys of the United States lands are made.

I think, may it please your Honors, that I have now drawn the attention of the Court to all the points in the history of this title, and to such suggestions as to the law bearing upon it as had occurred to my mind; and although I should be very sorry to neglect anything in a case of this magnitude and importance, I believe I have not done so, and I shall

leave it in the hands of the Court. Mr. Joy purchased these lands of the government in good faith and in accordance with the apparent and the real authority of the agents of the government to sell them. They have been patented to him, he has paid for them and the purchase money has been appropriated by Congress. Will this Court say he has acquired no title?

NOTE. — As I was rising to address the Court, and when it was too late for me to consider them, two new points were started: —

First, — That the treaty was promulgated the 10th of June, and Secretary Browning signed the contract on the 8th of June.

To this I submit: —

(1.) That as respects the rights and duties of each of the contracting parties, the treaty takes effect from its date (9 Wal. 32); and the act of Secretary Browning was intended to be in the discharge of a duty of the United States under the treaty.

(2.) The supplemental treaty did not require Secretary Browning to enter into any executory contract; it validated the contract of his predecessor, with modifications specified.

(3.) The lands having been patented to Mr. Joy, pursuant to the treaty, it is immaterial whether he held a valid written executory contract for such patents or not. Such a contract would not strengthen his title by patent, nor can the absence of such contract weaken it.

Second, — The contract was invalid for want of sufficient stamps.

(1.) The last two suggestions under the first head apply also to this objection.

(2.) The appellants put the contract in evidence, and it is too late now to object that it was unstamped (act of July 13, 1866, 14 stat., 143, bottom line).

(3.) This was an official instrument, signed by the Secretary of the Interior, and by Mr. Joy, and deposited in the archives of the department, and required no stamp. (14 sts. 141.)

(4.) It is not perceived how it is shown by the appellant that the instrument he put in evidence was not properly stamped. In the absence of proof, the presumption is in favor of the action of the Secretary.

(5.) Neither of the objections to the contract if tenable strengthens the title of the appellant, or weakens the patent title of Mr. Joy.